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§ Law in Context

WILLIAM TWINING

Rethinking Evidence

Exploratory Essays

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Rethinking Evidence

The Law of Evidence has traditionally been perceived as a dry, highly technical, and mysterious subject. This book argues that problems of evidence in law are closely related to the handling of evidence in other kinds of practical decision-making and other academic disciplines, that it is closely related to common sense and that it is an interesting, lively and accessible subject. In recent years the emergence of evidence as a multidisciplinary field has been further stimulated by advances in forensic science, concern about intelligence after 9/11, the search for weapons of mass destruction in Iraq, and developments such as evidence-based medicine.

These essays, written over a period of twenty-five years, develop a readable, coherent historical and theoretical perspective about problems of proof, evidence, and inferential reasoning, and story-telling in law. Although each essay is self-standing, they are woven together to present a sustained argument for a broad inter-disciplinary approach to evidence in litigation, in which the rules of evidence (which have been the main focus of attention in the past) play a subordinate, though significant role.

This revised and enlarged edition includes a revised introduction, the best-known essays in the first edition, and new chapters on narrative, generalisations and argumentation, teaching evidence, and evidence as a multi-disciplinary subject.

This book provides the theoretical background to the very practical *Analysis of Evidence* (Anderson, Schum and Twining, 2nd edition, Cambridge University Press 2005). It will also be of interest to anyone concerned about the role of evidence in their own discipline.

William Twining is Quain Professor of Jurisprudence Emeritus at University College London, and a regular Visiting Professor at the University of Miami School of Law. His writings on evidence include *Analysis of Evidence* (2nd edition, Cambridge University Press 2005).

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Rethinking Evidence

Exploratory Essays

Second Edition

William Twining



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For Peter

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Preface

The first edition of this book was published in 1990. It consisted of eleven linked essays. The last chapter, ‘Rethinking Evidence’, outlined a general perspective on the processing and use of information in litigation as the basis for a broad interdisciplinary approach to the study of evidence in law. The essays had been written over sixteen years and were presented in the form of an intellectual progression, starting with an overview entitled ‘The Story of a Project’.

In this extended edition, three of the original chapters have been dropped or replaced and eight more essays have been added, all written since 1990. The Introduction (chapter 1) has been extended and chapter 11 becomes chapter 7. The idea of the story of an intellectual progression has been retained. Chapters 2–7 are unchanged, except for a few minor corrections and some extra footnotes, which are indicated by square brackets. These chapters are a slightly condensed version of the first edition. Each essay is self-standing, but taken together they form a coherent historical and theoretical argument. The remaining chapters continue the story.

There have, of course, been many theoretical, legal, and practical developments in the subject of evidence in law since the first edition was completed. To have attempted a comprehensive overview of these here would have radically altered the shape of the book. Instead, developments that are immediately relevant are discussed or referred to in the recent essays, especially chapters 8, 14, and 15. A few significant sources are referred to in footnotes in square brackets in Chapters 1–7.¹

1 Major developments in the law of evidence and procedure in England since 1990 are noted in chapter 6. Useful overviews can be found in Zander (2003a), Cross and Tapper (2004), and Roberts and Zuckerman (2004). Similarly, relevant legal developments in the United States can be tracked in the latest editions of standard reference works, case books, and supplements (e.g. McCormick (1999) and supplements). For Australia, see Ligertwood (1998) and Odgers (2002). There is an enormous literature on scientific evidence, including some important theorising. (See, for example, Allen (1991), Damaska (1997), Haack (2003a), (2003b) and Becher-Monas (forthcoming, 2006)). Significant contributions to the intellectual and legal history of evidence since the first edition include C. Allen (1997), Franklin (2001), Langbein (2003), McNair (1999), Shapiro (1991) and Swift (2000). Other theoretical developments are diverse and less easy to track. Chapters 8, 14 and 15 below and Roberts and Zuckerman (2004) deal with some of these. See further J. Jackson (1996), Twining (1997b), (1997e), Allen and Leiter (2001), Park (2001), and recent issues of specialist journals, such as *The International Journal of Evidence and Proof* and *Law, Probability and Risk*.

Since 1990 my work on evidence has developed in three main ways. First, I have continued to teach the logic of proof to law students as a set of intellectual and practical skills concerned with constructing, reconstructing, and criticizing arguments about questions of fact. My co-authors, Terry Anderson and David Schum, and I have refined and adjusted our teaching of this subject without changing the basic approach, as can be seen in the differences between the first and second editions of *Analysis of Evidence* (Anderson and Twining, 1990; Anderson, Schum, and Twining, 2005). *Rethinking Evidence* can be read as a companion volume to that book, providing the historical and theoretical background to the more practical approach of *Analysis*. The two books are now better integrated through cross-references.

Secondly, during the past fifteen years I have continued to explore topics relating to stories and especially the relationship between narrative and argument in legal contexts. Chapters 8–13 deal with these themes from a number of perspectives.²

The third development since 1990 has been a broadening of my focus of attention, first to include a civil law jurisdiction (the Netherlands), and then to consider evidence in other disciplines. In 1994–95 Terry Anderson and I were Fellows at the Netherlands Institute of Advanced Study (NIAS), participating in a group project on ‘Forensic expertise in the Netherlands criminal justice system’. This was my first sustained exposure to a civil law system. The experience reinforced my belief in the transferability of some general ideas and techniques about evidence (principles of inferential reasoning, the Rationalist Tradition, the roles of narrative), but it also brought home the enormous cultural and institutional differences between legal practices and procedures in the Netherlands, England and the United States. Getting to grips with the details of Dutch criminal procedure involved a series of culture shocks that did not diminish with familiarity – indeed sometimes they were sharper. The main results of this particular experience have been published elsewhere,³ but this experience has subtly influenced one’s perceptions of many topics.

Another broadening of focus is of a different kind. The study of evidence in law has always involved interaction with other disciplines, but recent developments in science, computing, terrorism, politics, policy-making, and fiction have converged to give issues concerning evidence a very high profile in many different arenas. This in turn has raised the question whether there can be a unified multi-disciplinary subject (or even ‘Science’) of Evidence. *Evidence and Inference in History and Law* (2003, edited with Iain Hampsher-Monk) was the product of an extended interdisciplinary project that started in the Netherlands Institute of Advanced Study in 1994. This in turn can be seen as a precursor of a major multi-disciplinary programme on evidence at University College London (2003–). ‘Evidence as a

² This is a selection of my writings about narrative and argument. See also *GJB*, chs. 13 and 14 and Twining (1999).

³ I contributed to a book based on our project, *Complex Cases* (Malsch and Nijboer (eds.) 1999) and wrote a number of separate papers (Twining (1995), (1997b), (1997c)).

Multi-disciplinary Subject' (ch. 15) is a programmatic statement of the central ideas. It shows how the general perspective developed in *Rethinking Evidence* can be extended far beyond law. However, *Rethinking Evidence* remains coherently a book about the subject of evidence in law. It contains some matter of potential interest to non-lawyers, but the primary audience is legal. David Schum's projected general introduction to Evidence (with which I am associated) will, by contrast, be a genuinely multi-disciplinary book addressed to a general audience.

Acknowledgements

First edition

One of the blessings of academic life is the collegiality that transcends institutions, countries and disciplines. These essays were written over a period of sixteen years during which I have benefited from the comments, advice, criticisms and friendship of more students, colleagues, editors, librarians and others than it is possible to list. A few of these debts have been acknowledged in the endnotes of individual essays either here or, in some cases, where they were first published. A more general debt is due to Terry Anderson, Ian Dennis, Neil MacCormick, David Schum, Alex Stein, Peter Tillers and Adrian Zuckerman. As usual I owe most to my wife for more support, advice and practical help than I deserve.

Iffley (1990)

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WLT

Iffley (2005)

Abbreviations

ABA	American Bar Association
ABAJ	<i>American Bar Association Journal</i>
<i>Analysis</i> (1991)	T. Anderson and W. L. Twining, <i>Analysis of Evidence</i> (1st edition 1991, Boston: Little, Brown; London: Weidenfeld and Nicholson; reissued 1998 Evanston: Northwestern University Press)
<i>Analysis</i> (2005)	T. Anderson, D. Schum and W. L. Twining, <i>Analysis of Evidence</i> (New York: Cambridge University Press, 2005)
Bentham CW	<i>The Collected Works of Jeremy Bentham</i> , prepared under the supervision of the Bentham Committee, University College London (London: Athlone Press, 1968–82; Oxford: Oxford University Press, 1983–)
Bentham Works	<i>The Works of Jeremy Bentham</i> , published under the superintendence of John Bowring (Edinburgh, 1838–43)
Boston UL Rev	<i>Boston University Law Review</i>
Calif L Rev	<i>California Law Review</i>
CJA	Criminal Justice Act 2003
CLRC	Criminal Law Revision Committee
Col L Rev	<i>Columbia Law Review</i>
Crim L Rev	<i>Criminal Law Review</i>
<i>Cross on Evidence</i>	R. (later Sir Rupert) Cross, <i>Evidence</i> (London, 1st edn, 1958; 6th edn by C. Tapper, 1985; now <i>Cross and Tapper</i> , 10th edn, 2004)
E and P	<i>International Journal of Evidence and Proof</i>
EBM	evidence based medicine
EPF	Evidence, Proof, and Fact-finding
FL	W. L. Twining (ed.), <i>Facts in Law</i> , ARSP Beiheft No. 16 (Wiesbaden, 1983)

GJB	W. L. Twining, <i>The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories</i> (Aldershot: Ashgate, 2002)
Harv L Rev	<i>Harvard Law Review</i>
HTDTWR	W. L. Twining and D. Miers (1999) <i>How To Do Things With Rules</i> (2nd edn, London, 1982) (3rd edn, 1991; 4th edn, 1999)
IL	Information in Litigation
Jo Leg Ed	<i>Journal of Legal Education</i>
JSPTL (NS)	<i>Journal of the Society of Public Teachers of Law</i> (New Series) (later <i>Legal Studies</i>)
Law and Soc Rev	<i>Law and Society Review</i>
LIC	W. L. Twining, <i>Law in Context: Enlarging a Discipline</i> (Oxford: Oxford University Press, 1997)
LQR	<i>Law Quarterly Review</i>
LTCL	W. Twining (ed.), <i>Legal Theory and Common Law</i> (Oxford: Blackwell, 1986)
Mich L Rev	<i>Michigan Law Review</i>
MLR	<i>Modern Law Review</i>
NIAS	Netherlands Institute for Advanced Study
NILQ	<i>Northern Ireland Law Quarterly</i>
NITA	National Institute of Trial Advocacy
NYUL Rev	<i>New York University Law Review</i>
Oxf Jo Leg Stud	<i>Oxford Journal of Legal Studies</i>
TEBW	W. L. Twining, <i>Theories of Evidence: Bentham and Wigmore</i> (London: Weidenfeld and Nicolson, 1985)
Thayer Treatise	J. B. Thayer, <i>A Preliminary Treatise on Evidence at the Common Law</i> (Boston: Little, Brown and Co., 1898; reprinted, New Jersey: Rothman, 1969)
U Chi L Rev	<i>University of Chicago Law Review</i>
UCL	University College London
UCLA L Rev	<i>University of California at Los Angeles Law Review</i>
U Pa L Rev	<i>University of Pennsylvania Law Review</i>
Vand L Rev	<i>Vanderbilt Law Review</i>
Wigmore Science	J. H. Wigmore, <i>The Principles of Judicial Proof</i> (Boston: Little, Brown and Co. 1st edn, 1913; 2nd edn, 1931; 3rd edn, sub nom. <i>The Science of Judicial Proof</i> , 1937)
Wigmore Treatise	<i>A Treatise on the System of Evidence in Trials at Common Law</i> (Boston: Little, Brown and Co. (1st edn, 1904–5), cited as 1 Wigmore <i>Treatise</i> , s. –; later editions cited as 1 Wigmore <i>Treatise</i> (Tillers rev., 1983), s. –. (1998–) <i>The New Wigmore: A Treatise on Evidence</i> . R. Friedman (ed.) New York. (cited as <i>The New Wigmore</i>)).

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Hedley Byrne and Co Ltd v Heller and Partners [1964] AC 465, HL 325ⁿ⁷¹, 330ⁿ¹³⁸
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326ⁿ⁹¹
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Introduction

The Story of a Project*

Once upon a time a jurist in mid-career decided that the time had come to test and explore the implications and applications of some of his more general ideas at less abstract levels. The starting-point was an interest in ‘broadening the study of law from within’ as part of a conception of the discipline of law as an intellectual activity primarily concerned with the creation and dissemination of knowledge and critical understanding within ‘legal culture’.¹

The first step was to select a traditional field that seemed ripe for rethinking. There were several candidates. Torts, which he had taught for several years and which was in process of being deconstructed and redistributed; Contract, which was coming to be perceived almost as the paradigm or test case of legal scholarship; Land Law, on which several colleagues had done some promising ground-clearing work without having yet established a clear path out of the thickets of feudal arrangements and medieval doctrine; and Evidence, which had some intriguing ancestors in Bentham, Wigmore, Thayer and Frank, but which seemed to have been going through a somewhat stagnant phase in recent years.

The choice of Evidence was sealed by an epiphanic moment. In 1972, during a heated debate about proposed reforms of Criminal Evidence, Sir Rupert Cross, the leading English evidence scholar of the post-war era said: ‘I am working for the day when my subject is abolished.’² This was provocative at several levels. In the immediate context it was ideologically offensive to one who saw at least some of the surviving rules of evidence as symbolizing important civil libertarian values and providing some, admittedly fragile, safeguards for persons suspected or accused of crime. At a personal level, it was intriguing to speculate about the seeming ambivalence or masochism underlying the remark. Successful expositors have a vested interest in the survival of their chosen field(s). Even more intriguing was the suggestion that if the rules of evidence were abolished there would be nothing left to study. The conception of the subject implied in this remark was that the Law of Evidence was co-extensive with the subject of Evidence – a school-rules view of the field.³ This naturally raised further questions: How much of evidence doctrine consists of rules? What would we study if there were no rules? What should we be studying about evidence or ‘evidence plus’ in addition to the rules? What would be the place of the Law of Evidence within a broadened conception of the

subject? And by what criteria might one judge what parts of our existing heritage of evidence doctrine might be worth preserving or extending?

This casual remark provided an almost ideal starting-point for my project. For was not the enterprise of ‘broadening the study of law from within’ directed specifically to constructing alternatives to this kind of narrow, rule-bound ‘formalism’? And was not Evidence – narrowly conceived, riddled with technicality, relatively neglected as a subject of academic study in England, and prone to cyclical, repetitious, deeply unsatisfying political debates – ripe for rethinking in this way?

About six years later, but still at a relatively early stage of my explorations, I reported on my project thus:⁴

One central problem may be restated as follows: most Evidence scholarship in the Anglo–American tradition (and here I would include courses on Evidence and public debate on evidentiary issues) has concentrated on and been organized around the *rules* of evidence, especially the exclusionary rules, and their rather limited framework of concepts. Within that tradition work on other aspects of evidence, proof and fact-finding has at best been fragmented and spasmodic. Work in such fields as forensic science, witness psychology, the logic of proof, probability theory, and the systematic study of fact-finding institutions and processes has proceeded largely independently, not only of the study of evidence doctrine, but also of each other. All these lines of enquiry – and many others – seem to be related, but the exact nature of the relationships is often puzzling and obscure. From the point of view of a broadened conception of legal scholarship it is worth asking: Is it possible to develop a *coherent* framework for the study of evidence, proof and related matters within academic law?

As a first step towards confronting this question, I sought to analyse and diagnose the main reasons for my dissatisfaction with the prevailing tradition of evidence scholarship and debate. After all if one is able to articulate one’s own grounds for dissatisfaction with a corpus of literature, this can at least suggest some implicit criteria for a more satisfying approach. These criteria may then be articulated, refined and systematized. After some reflection I concluded that, at a general level, at least four main charges could be made against the orthodox literature as it was a few years ago: First, it was too narrow. Because it had focused almost exclusively on the rules of admissibility, it had almost systematically neglected a whole range of other questions, such as questions about the logic and psychology of proof. Secondly, it was atheoretical: the leading theorists of evidence, such as Bentham or Gulson or Jerome Michael, have in recent years either been ignored entirely or have been used or abused extraordinarily selectively; most discussions of evidentiary issues have proceeded without any articulated and coherent theoretical framework for describing, explaining or evaluating existing rules, practices and institutions. By and large orthodox evidence scholarship had assumed a rather naive, commonsense empiricism, which failed to confront a variety of sceptical challenges to orthodox assumptions, ranging from Jerome Frank’s fact-scepticism, through politico-ideological critiques, to various forms of epistemological relativism. It had proceeded in almost complete isolation from developments in relevant branches of philosophy. Thirdly, in so far as orthodox academic discourse has moved beyond

simple exposition, it has tended to be incoherent: for the conceptual framework of legal doctrine often does not provide an adequate basis for establishing links with other kinds of discourse; by and large this is true of the Law of Evidence. For instance, the orthodox expository framework cannot easily accommodate even something as central as the nature of reasoning about probabilities in forensic contexts, a topic which has recently been given prominence in this country by Jonathan Cohen, Glanville Williams and Sir Richard Eggleston.⁵

Fourthly, the expository orthodoxy can lead to distortions and misperceptions of key evidentiary issues and phenomena. A weak version of this charge is that by concentrating on some issues to the neglect of others, a misleading impression is given of the subject as a whole. A stronger version is that such imbalances actually lead to misperceptions and error. Here one illustration must suffice: because of the concentration on the exclusionary rules, nearly all of the existing literature on confessions treats retracted confessions as the norm; yet retracted confessions surely represent only a small minority of all confessions. Typically, neither the scholarly literature nor public debate gives a balanced and realistic total view of the role of confessions in the criminal process; for example, the significance of confessing as an important stage en route to a guilty plea. Evidence scholarship has failed to give a systematic account of confessions in criminal process as *phenomena*. As a result, it provides no clear answers to such questions as who confesses to whom about what under what conditions, in what form, and with what results? Yet it is difficult to see how one can hope to make sensible and informed judgements about the issues of policy relating to confessions and interrogation without at least tentative working answers to such questions.

This kind of criticism suggests some criteria which a broader approach to the study of evidence would need to satisfy in order to meet these objections, in so far as they are well-founded. To meet the charge of narrowness, it would be necessary to identify at least the most important questions which ought to be tackled in a systematic and comprehensive approach to the study of evidence. This requires an adequate theoretical and conceptual framework.

To meet the charge of incoherence, the relationships between the different lines of enquiry would need to be charted carefully and explicitly – there are, for example, some puzzling questions about the connections between the logic and the psychology of proof, or again, between the study of evidence and proof on the one hand and of criminal and civil procedure on the other.

To meet the charges of theoretical naivety, important theoretical puzzles and disagreements would need to be identified and considered. It is not good enough to dismiss the sceptics, however exaggerated their views may be, by pretending that they do not exist or that what they say is irrelevant.

And to meet charges of distortion and misperception, it is important to paint as realistic a total picture as possible of the phenomena under consideration, so that particular issues can be set in the perspective of some reasonably balanced and realistic overview of the whole. That is part of what is meant by studying law in context. For example, one of the main objections to the CLRC Eleventh Report is that it tended to treat trials on indictment as representative of all trials and professional criminals as

representative of all suspects, and was silent about the scale of many of the phenomena and types of behaviour which it was purporting to discuss.⁶ To a lesser extent similar criticisms might also be made of the Devlin Report on Identification.⁷ If recent public debate about the exclusionary rules and about particular problems of fact-finding, such as problems related to identification, had been set in the context of a broad and balanced total picture, it would have been much easier to make confident judgements about the problems and some of the recommended solutions. Within that perspective it would have been difficult for the CLRC to ignore almost entirely evidentiary problems in Magistrates' Courts and for the Devlin Committee to overlook the fact that the problem of misidentification of juveniles, which rarely reaches the stage of trial on indictment, may be one of the most serious aspects of the total problem of misidentification. Such considerations suggest that in order to develop a broader approach to the study of evidentiary questions it would be helpful, perhaps necessary, to develop a working theory of evidence, proof and fact-finding in adjudicative processes.⁸

Having reached this stage, an obvious next question to ask was: Has anyone tried to develop such a theory before? It did not take long to discover that this was by no means a novel enterprise, even within the Anglo-American tradition of Evidence scholarship. In particular, Bentham's *Rationale of Judicial Evidence*, and his other very extensive writings on evidence and procedure, and Wigmore's *Principles of Judicial Proof* could both be viewed as attempts to develop a working theory for a broad approach to the study of the problems of evidence and proof respectively.⁹ Whatever their short-comings, each of these works ranks among the major achievements of our scholarly heritage. Each of them can provide a rich and convenient starting-point for attempting to develop a contemporary theory which seeks to satisfy the kind of criteria suggested above. Yet they have been largely ignored.

It was not surprising, indeed it was rather encouraging, to find that there had been previous attempts to tackle the problem that I had posed to myself. But there were some aspects of the history of the study of evidence which were surprising and ultimately very daunting.

The intellectual history of Evidence scholarship is full of fascinating twists and turns. It could, I suspect, be treated as a representative case study of the intellectual history of Anglo-American academic law. It includes many ironies and paradoxes: orthodox study of the law of evidence has been one of the least empirically oriented branches of academic law. The work of specialists in Evidence, such as Wigmore and Cross, ranks among the highest achievements of legal scholarship. Yet does not much of the secondary writing on Evidence, to borrow a phrase from Holmes, rank 'high among the unrealities'?¹⁰

One aspect of this history is particularly relevant to my present theme: there has been a natural tendency within the Anglo-American tradition to treat Evidence scholarship as starting in the eighteenth century, first with the early expository treatises of Gilbert and Peake, and then with Bentham's writings on evidence.¹¹ According to this account the judges developed the common law rules piecemeal; the early expositors tried to reduce the case law to at least partial order and in so doing gave Bentham a clear target to attack: the technical system of procedure and the whole corpus of evidentiary rules.

Although he was conscious of the logical and psychological aspects, even Bentham's work is to a large extent rule-centred, for the core is an obsessive and repetitious attack on the very idea of having formal rules of adjective law.

I suggest that this view of the intellectual history of Evidence scholarship is a good example of the kind of distortion that a narrowly rule-centred conception of academic law can produce. For the study of problems of evidence and proof in forensic contexts does not start with Gilbert and Peake and Bentham. It has a very much longer history than that. For example, the study of the logical and psychological aspects of the subject can be traced back all the way to classical rhetoric. Rhetoric, viewed as the study of persuasive discourse, was a central part of the humanistic tradition of Western learning from Corax of Syracuse in the 5th century BC right through until the early nineteenth century. It was part of the trivium of logic, grammar and rhetoric; the intellectual histories of, for example, inductive logic, literary criticism and the study of communication are inextricably bound up with the long and complex story of rhetoric as an academic subject.¹² Now, one of the most important stimuli for the development of classical rhetoric, perhaps the single most important one, was a practical concern with the art of pleading in court: many of the classical texts, *The Murder of Herodes*, some of the speeches of Demosthenes and Cicero, are examples of forensic oratory. Similarly persuasive discourse and concern with probability are as important as ever for contemporary legal practice. The irony is that although legal processes provided one of the most important stimuli for the early development of rhetoric as a subject, contemporary legal scholarship and legal education have, with some notable exceptions, recognized neither its historical nor its contemporary significance. Although this may be a simplification, I would suggest that there is a single main reason for this: it is that legal scholarship has taken legal doctrine as its *starting-point* – thus even the two subjects which are most closely concerned with the issues which lie at the centre of the rhetorical tradition, the study of evidence and probability and the study of reasoning in forensic contexts, do not treat these questions. The modern study of evidence is largely equated with the study of the rules of evidence, just as the study of legal reasoning (and the traditional moot) are confined almost entirely to reasoning about disputed questions of law. The study of rhetoric on the other hand was concerned with reasoning and persuasion in regard to disputes about facts, arguments about policy and arguments about law-making and, only rather peripherally, with questions about legal doctrine. This is just one instance of an over-concentration on rules of law contributing to the dual divorce of legal scholarship from a central part of the tradition of humanistic learning on the one hand, and from the concerns and realities of some important aspects of legal practice on the other. This in turn suggests that a redefinition of the boundaries of academic law, including both legal scholarship and legal education, would not involve embarking on uncharted waters; rather it would involve a return to a place in the mainstream of the humanistic tradition of learning.

Now there is a danger that all of this may sound rather grandiose. So let me make a confession. If [someone] had asked: 'How far have you got?' the answer would have been: 'The project has at least ten years to go.' If she had asked: 'Are you not opening a Pandora's box?' it would have been dishonest to deny it. The prospect of developing

a framework for the study of evidence and proof which is broad and coherent and has some prospect of satisfying reasonable standards of scholarship is extremely daunting. It is calculated to bring on recurrent attacks of that familiar disease; 'the sabbatical blues'.

That was written in 1978. Ten years on [in 1988–89], I can update this report as follows. The enterprise has made progress on three main fronts: first, a fairly extensive, but selective, review of one part of our heritage of evidentiary texts – specialized secondary Anglo–American writings about evidence – has been completed. The most detailed part of this, case-studies of two of the leading figures in the tradition, has been published as a book: *Theories of Evidence: Bentham and Wigmore*.¹³ This was a quite limited enterprise in that it was restricted to an introductory account, 'more expository than critical', of two specific works, Bentham's *Rationale of Judicial Evidence* and Wigmore's *Principles of Judicial Proof*, set in the context of an argument that our received heritage of specialized secondary texts about evidence has been dominated by a remarkably homogeneous set of ideas and assumptions that have their roots in eighteenth-century Enlightenment rationalism. The restricted nature of that book deserves emphasis. Apart from limitations of time, space and expertise, I did not attempt a full-scale contextual intellectual history because this was meant to be a preliminary stock-taking of the central tradition of our received ideas as part of a contemporary exploration of the subject. Bentham's writings on evidence in particular deserve a much more detailed and genuinely historical treatment, as does the development of the underlying ideas, legal doctrine and legal practice in this area. Three early essays in this volume (chapters 2, 3 and 6) – an extended version of the essay on the Rationalist Tradition, an exploration of some seemingly sceptical challenges to this ideal type, and a critical reinterpretation of the Thayerite conception of the Law of Evidence – are also quasi-history. They too represent a critical stock-taking of selected parts of a rich heritage rather than intellectual history *stricto sensu*.¹⁴

The second sub-project that has been brought to completion is a set of teaching materials on *Analysis of Evidence* prepared in collaboration with an American law teacher and litigator, Terence Anderson, and an English Professor of Statistics, Philip Dawid.¹⁵ This work is based on Wigmore's account of the logic of proof (including his Chart Method of analysing mixed masses of evidence) and seeks to interpret, develop and to some extent subvert it. The materials are intended as a vehicle for developing some intellectual awareness and analytical skills in intending legal practitioners. It is not necessary to describe the work here, but it is relevant to give a brief account of some lessons I have learned from this experience of preparing and using the materials and working with an American attorney, a statistician and the ghost of Wigmore.

One of the central themes of the essays that follow relates to the uses and limits of 'reason' in fact-determination. The experience of extensive and intimate collaboration over several years has not resolved all of my doubts, uncertainties and

confusions. Indeed, it has opened up some others. What it has done, however, has been to exorcize certain spectres. For example, at first sight the secondary discourse of advocates often suggests a fundamental scepticism about the relevance of 'rational' analysis and intellectual skills to the task of selecting, seducing, impressing, and persuading jurors in the adversary system. 'The hard-nosed practitioner' claims to be concerned with 'winning, not justice', 'proof, not truth', 'persuasion, not reason', 'experience, not logic', 'Art not Science', 'feel, not analysis', 'theatre, not ...' and so on.¹⁶ Manuals of advocacy emphasize body language, eye-to-eye contact, rhetorical devices, manipulative and diversionary tactics, making a good personal impression, gaining and keeping attention, brevity and simplicity. The more explicit American treatments of jury selection exhibit an uninhibited concern for the exploitation of all kinds of bias, prejudice and stereotyping – race, gender, class, religion, nationality.¹⁷ On the surface, most say almost nothing about rational argument. The discourse of advocacy is a rich source of ammunition against sharp distinctions between fact and value, fact and law, reason and intuition, and other similar discriminations. My experiences suggest that the hard-nosed practitioner's 'and nots' just do not work – either way. Even the crudest cook-books on advocacy presuppose, build on, and even pay homage to, a basic, indeed somewhat formalized rationality. My collaborator, Terry Anderson, was independently attracted to Wigmorean analysis because it offered a means of injecting some intellectual rigour into modes of training that he considered were too dominated by the 'touchy-feelies'. Some of those who know him might wish to dismiss his faith in reason as utopian or eccentric, but he can hardly be accused of indifference to the theatrical and rhetorical aspects of advocacy. The reactions of students, especially those who have had extensive practical experience of litigation, are perhaps better evidence. Almost without exception, even the most laborious form of Wigmorean analysis converts them – 'I wish I had had that before I tried my first case.' For me the first lesson of this experience is that neither simple faith in reason nor brute scepticism will do.

Another fallacy that has been exposed by this project has been the idea that Wigmore's Chart Method and one or other versions of the calculus of probability are rigid, 'mechanical' devices based on doctrinaire versions of pseudo-science – at best of little practical use for legal practitioners, at worst dangerous instruments of delusion of self and others.¹⁸ Wigmore's 'logic of proof' was indeed rooted in a particular intellectual tradition and presented in a rather formal manner. But experience of using and teaching them – for the purpose of reconstructing, constructing and criticizing arguments – suggests that Wigmore's method, Bayes' Theorem and other axioms of probability are extraordinarily flexible and powerful intellectual tools which, if used with sensitive awareness of their nature, make clear the operation of 'subjective' values, biases and choices at almost every stage of complex intellectual procedures.

Again, it could be pointed out that my other collaborator, Philip Dawid, is a distinguished subjectivist and so not typical of proponents of 'misplaced mathematicization',¹⁹ whose influence on evidentiary theory is often sharply

attacked as politically dangerous as well as philosophically wrong. But, in my experience, the main messages of statisticians to the non-expert consist of warnings about the misuse of statistical analysis. The dangers are real, but they lie with the half-educated, the innumerate and those unable to spot elementary statistical fallacies. I remain unpersuaded by claims that either in principle or in practice lawyers' reasonings can be subordinated to Bayes' Empire, but that is for different reasons than the idea that they are 'mechanistic'.²⁰

Theories of Evidence represented an attempt to take stock of this part of our intellectual heritage through a detailed study of two of its leading figures. *Analysis of Evidence* is intended as a set of learning materials for developing a group of flexible intellectual skills of potential value to practitioners. This third product of the continuing enterprise is more varied. The essays in this volume were written over nearly fifteen years. While the general project has remained fairly stable, over time my ideas have developed and changed; each essay was written in a particular context for a specific audience. In selecting and revising them for inclusion, I have tried to reduce repetition and to make the book more coherent than a mere anthology. Although they are presented in an orderly sequence, each essay is intended to be self-standing and it is not necessary to read them in order. It may help to say something about each of them.

The first essay, 'Taking Facts Seriously' (chapter 2), was written for a Canadian audience in 1980. It was intended to arouse interest in the general area and to make the case for giving it more attention within academic law. Although the paper is ostensibly about legal education, the central thesis, that questions of fact deserve as much attention as questions of law, applies to legal scholarship and legal discourse generally. This was in essence a consciousness-raising exercise. At the time, Evidence as an academic subject was in the doldrums. In North America nearly all courses on evidence focused almost exclusively on the Law of Evidence and were strongly influenced by traditional bar examinations which tested doctrinal knowledge rather than fact-handling skills. In the United Kingdom, Evidence was eccentrically considered to be 'a barrister's subject'; it was studied only by a small minority of undergraduates and was given little emphasis in solicitors' training. The situation has greatly improved in the last ten years, but the case for taking facts more seriously is still worth making.²¹

'The Rationalist Tradition of Evidence Scholarship' (chapter 3) was originally written for a *Festschrift* in honour of Sir Richard Eggleston, an Australian judge and scholar, who has contributed as much as anyone to the recent revival of interest in the subject. The essay is in two parts: an historical survey of specialized Anglo-American secondary writings on evidence from 1750 to about 1970, and a reconstruction of common basic assumptions about the aims and nature of adjudication and about what is involved in reasoning about disputed questions of fact in this context. The essay thus has an historical and an analytical aspect. The historical thesis is that by and large leading specialized writings on evidence have approximated sufficiently to this ideal type to justify talking about a single, remarkably homogeneous tradition

of Evidence scholarship. The analytical thesis is that this ideal type is a useful starting-point for interpreting and evaluating any discourse about evidence and is not restricted to secondary writings or the common law world. The test of success of this analytical construct is its clarity, coherence and utility as a tool of analysis of evidence discourse and doctrine. A much abbreviated version of the original essay formed the first chapter of *Theories of Evidence* in order to set detailed studies of the ideas of Bentham and Wigmore in the context of the intellectual tradition of which they were the leading figures. In revising the essay for this volume, I have expanded it to include some additional material (especially on Stephen, Chamberlayne and Moore), and to respond to criticisms and questions from commentators on the earlier versions.

The next chapter, ‘Some Scepticism about Some Scepticisms’, was written as a sequel to ‘The Rationalist Tradition’. It explores whether and in what respects a direct challenge to central ideas in that tradition is offered by a sample of seemingly sceptical or relativist writings that bear directly or indirectly on fact-finding and adjudication. This study highlights some contrasts between specialized writings on evidence – homogeneous, intellectually isolated and rooted in a particular brand of eighteenth-century optimistic rationalism – and the more varied, iconoclastic and modernist approach of many writers about legal processes. The general conclusion is that few, if any, of the writers surveyed present a direct challenge to the core *concepts* (notably Truth, Reason and Justice) embodied in the Rationalist Model, but that the particular *conceptions* associated with this tradition are not the only possible ones and appear somewhat simplistic and old-fashioned today. In short, there is much worth preserving in our heritage of Evidence scholarship and there are no coherent alternative models in sight, but the subject is ripe for rethinking and updating.

‘Identification and Misidentification in Legal Processes: Redefining the Problem’ (chapter 5) develops and illustrates the application of a contextual total process model of litigation to a familiar topic. It was originally intended to point out to researchers into witness psychology that concentration on the reliability of eyewitness identification in contested jury trials was unduly constricted and that there are richer, more suggestive and more realistic models of legal processes available as a starting-point for their enquiries. The essay can also be read as a case study of the narrowing and distorting effects of the expository orthodoxy referred to above.

Chapter 6, ‘What is the Law of Evidence?’ was originally conceived as an attempt to present an overview of the subject to foreign lawyers, emphasizing the point that our Law of Evidence is neither as extensive nor as important nor as peculiar as its popular image abroad might suggest. Having presented this paper successively to audiences in Italy, China and Poland, I now offer it with only minor modifications to students of the common law as a way of seeing the subject whole. The interpretation could be described as a modified and updated version of Thayer’s vision of the common law of evidence as a series of rather limited exceptions to a principle

of free proof, meaning in this context free enquiry and ‘natural reason’. Thayer’s key perception was that the rules, standards, guidelines, instructions and other evidentiary norms serve mainly to structure arguments about disputed facts and to modify and to constrain general canons of practical reasoning in a particular kind of context. The idea that the Law of Evidence is primarily concerned with reasoning links this essay with a central theme of this book – the nature, uses and limitations of reasoning about questions of fact. It is hoped that this chapter will also serve to dispel some misconceptions: I have sometimes argued that the Law of Evidence is only one part of the subject of Evidence.²² This has been variously interpreted to mean that, like Bentham, I believe that all rules of evidence should disappear, or like radical indeterminists, I think that they have already disappeared or that they are uninteresting or unimportant. This essay should put such canards to rest.

‘Rethinking Evidence’ (chapter 7, formerly chapter 11) draws some themes together and outlines one possible way of looking at and redefining the field. It can even be interpreted as delivering on a rash promise to construct a mapping theory that at least indicates the main points of connection between the many different lines of enquiry that have emerged from this particular version of Pandora’s Box. However, it ends not with answers, but with questions. And if I am required to justify this let me borrow the final paragraph from a piece not included in this volume, my inaugural lecture at University College London in 1983:

It is tempting to move from a critique of past theories to a bold clarion call proclaiming the need for a new theory. My remarks on evidence could be interpreted as a call for a Brand New Theory of Evidence for the Modern Age. But this is also too neat and too simple. In sketching one possible way of developing a different perspective on evidence and information in litigation, I have been suggesting that legal theorists have a constructive role to play in building bridges, sculpting syntheses or hatching theories. The study of evidence also reminds us that all such structures are built on shifting sands. We may have to wait many years for a new theory of evidence to emerge, probably as the work of many minds. If it does, however useful or illuminating it may be, it will not be difficult to show up the flimsiness of its foundations, whatever its particular form and content. Meanwhile, there is one further job for the jurist to undertake in his daily work to examine critically the underlying assumptions of all legal discourse and to question established ways of thought, especially those that are becoming entrenched. One task of the theorist is to pick away at all assumptions, including his own. Whether he adopts the role of court jester or the Innocent in *Boris Godunov* or the child in the story of the Emperor’s clothes or any other form of hired subversive – his first job is to ask questions and, with the greatest respect to the greatest of our gurus, to let the consequences take care of themselves.²³

Chapter 7 (old chapter 11) was the culminating one in the first edition and tries to give coherence to what has gone before. The remaining chapters were all written after 1990. Chapters 8 through 13 explore themes about the relationship

between narrative and argument in legal contexts. Chapter 8, 'Legal Reasoning and Argumentation', is a revised version of an entry in the *International Encyclopedia of Social and Behavioral Sciences*. It is included to provide a general context for the following chapters. Chapter 9 is a light-hearted introduction to the general theme. Chapter 10, 'Lawyers' Stories', was my first venture into a seductive field. It is a preliminary exploration of some possible functions of story-telling by judges and advocates with particular reference to the relationship between rational and non-rational means of persuasion. Although rather diffuse, it introduces a range of concrete examples and issues that are developed further in later chapters. At the time this was written, narrative had become quite fashionable in many disciplines, as is illustrated by the Law and Literature Movement and 'the narrative turn' in several adjacent disciplines. In the heady atmosphere of post-modernism there was, and still is, a tendency to romanticize narrative and story-telling as an all-purpose remedy for a variety of intellectual evils: feminists claimed it as their own in counterpoint to (male) hyper-rationalism; post-modernists treated it as an antidote to scientistic modernity; and even more sober scholars, such as James Boyd White, treated narrative as the key to 'making sense of the world' and as a vehicle for 'the legal imagination'. Although generally sympathetic to most of these developments even in this first essay, I was swimming against the tide by emphasizing the potential misuses and abuses of narrative in legal contexts.

After 1990 I continued to explore relations between narrative and argumentation. Chapter 11 is a succinct restatement of my position as developed in several earlier papers.²⁴

Chapters 12 and 13 explore and extend the ideas through application to specific texts. 'The Shakespearean and the Jurist' (with René Weis) replaces two former chapters on the case of Edith Thompson. It takes the form of a dialogue, which contrasts two strikingly different approaches to a complex case, one emphasizing analysis, the other narrative. The important point, which has been missed by some commentators, is that Weis and I both treat narrative and logical analysis as complementary rather than as rival or incompatible methods.²⁵ Chapter 13, 'The ratio decidendi of the parable of the Prodigal Son', examines some possible analogies between biblical parables, morality tales, and legal cases, especially cases as precedents. It suggests that story-telling in law may be closer to theology than to the more fashionable subject of law and literature. Although this essay is not directly concerned with evidence, it is included here because it further develops themes about the relationship between general propositions and particular events and the distinction between fact and law.

The last two chapters round off the book in different ways. Chapter 14, 'Taking facts seriously – again', revisits the argument advanced in chapter 2, restates the case in a different context, and suggests that the time is ripe for a closer integration of the logic of proof and the law of evidence. Chapter 15, 'Evidence as a multidisciplinary subject', makes the case for treating evidence as an integrated multidisciplinary field in its own right with inferential reasoning at its core. This was written shortly before

University College London, my main academic base, was awarded a major grant for a multidisciplinary programme on evidence involving over twenty departments. The story continues.

- * This chapter was written at three different times. The main part was written in 1989 and is unchanged; this contains an extensive quotation from an account of the project in its early stages that dates from 1979. The last two pages (11–12) briefly introduce the essays that were completed in the period 1990 to 2004.
- 1 See generally my essays entitled ‘Some Jobs for Jurisprudence’ (1974), ‘Goodbye to Lewis Eliot’ (1980) and ‘Evidence and Legal Theory’ (1984); for full citations see the Bibliography.
- 2 I cannot be certain of the precise words used. For Cross’s position in that debate see Cross (1973); for an alternative view see below, chs. 6 and 7.
- 3 Simpson (1986).
- 4 From Twining (1980a).
- 5 Cohen (1977); Williams (1979a and 1979b); Eggleston (1978, 1979). [See *Analysis* (2005) and Appendix I.]
- 6 Criminal Law Revision Committee, 11th Report (Evidence) (1972).
- 7 Devlin Report (1976).
- 8 This formulation of the organizing concept for such a theory is tentative. Bentham advanced a theory of evidence; Wigmore a theory of proof in trials at common law. What is being suggested here is much broader than that: it would extend at least to all types of litigation, to all stages in such processes, and would not necessarily be confined to common law systems. See below, ch. 7.
- 9 See esp. Bentham I and VII *Works*; Wigmore *Science* (1913b, 1931, 1937). The Bentham papers contain an extensive collection of unpublished manuscripts on Evidence. See *TEBW*, *passim*.
- 10 Holmes (1897) 475.
- 11 E.g. Wigmore (1908a), 695–7; cf. Montrose (1968), 286. See below, ch. 3.
- 12 On the history of rhetoric, see Kennedy (1963, 1972); J. J. Murphy (1974). A useful overview is included in Corbett (1965).
- 13 *TEBW* See list of Abbreviations for full citation.
- 14 On the distinction see Twining (1985b), 336, n. 13.
- 15 *Analysis* (1991). [The edition by Anderson, Schum and Twining (*Analysis* (2005)), with an appendix on probabilities by Philip Dawid, has been very largely rewritten and extended, but the basis ideas and some of the examples and exercises are much the same. For those who are not familiar with it, Wigmore’s ‘chart method’ is a specific technique for analysing a complex body of evidence. In respect of a given case or disputed issue of fact, all of the data that are relevant and potentially usable in an argument for or against a particular conclusion (‘the ultimate probandum’) are analysed into simple propositions that are incorporated in a ‘key-list’ of propositions. The relations between all the propositions on the key-list are then represented in charted form using a prescribed set of symbols, so that the end product is a chart of a (typically complex) argument. The method is like chronological tables, indexes, stories, and other

devices in that it is useful for ‘marshalling’ or ‘managing’ complex bodies of data so that they can be considered as a whole; it differs from these in that the organizing principle is the logical relationship between propositions in an argument rather than time sequence, narrative coherence, source, alphabetical order, or taxonomy. The method is also useful for identifying strong or weak points in an argument and subjecting these key points to rigorous, detailed, ‘microscopic’ analysis. For a description of the original method see Wigmore *Science* (1937) ch. XXI. For a description of the method modified for contemporary use, see *Analysis* (2005) chs. 4 and 5.]

- 16 See below, ch. 4. For an extreme version of the view of trials as political theatre see Graham (1987).
- 17 A classic example is C. Darrow, ‘Selecting A Jury’ (1936), reprinted in Jeans (1975) 167–72. The following quotation gives some of the flavour of the whole piece: ‘Beware of Lutherans, especially the Scandinavians; they are almost always sure to convict . . . As to Unitarians, Universalists, Congregationalists, Jews and other agnostics, don’t ask them too many questions; keep them anyhow; especially Jews and agnostics. It is best to inspect a Unitarian, or a Universalist, or a Congregationalist, with some care for they may be prohibitionists; but never the Jews and the real agnostics!’ (ibid., at 170).
- 18 E.g. Graham (1987) at 1222–5; for a response, see Twining (1988a).
- 19 The phrase is L. J. Cohen’s (1980a) 91. For Prof. Dawid’s views see *Analysis* (1991) Appendix. [See now *Analysis* (2005) Appendix I and Dawid (2005a).]
- 20 See 68 Boston UL Rev (1986) 391–9.
- 21 [See ch. 14 below.]
- 22 E.g. ch. 2 below.
- 23 Twining (1984a) 282–3.
- 24 Especially Twining (1995), (1997c), (1999) and *GJB*, ch. 14.
- 25 See further *Analysis* (2005) ch. 6.

Taking Facts Seriously*

Once upon a time, on the eastern seaboard of Xanadu, a brand new law school was established. An innovative, forward-looking, dynamic young dean was appointed, and he quickly recruited a team of innovative, forward-looking dynamic young colleagues in his own image. At the first faculty meeting – there were as yet no students to complicate matters – the only item on the agenda was, naturally, curriculum. The dean opened the proceedings: ‘Persons,’ he said, ‘there is only one question facing us today: What can we do that is new, creative, innovative, path-breaking . . . ?’ His colleagues nodded assent; being young and forward-looking they had not yet learned that even in legal education there is nothing new under the sun. Suggestions followed quickly: law and the social sciences, a clinical programme, psycho-legal studies, eco-law, computer-based instruction, law and development, and many of the fads, fashions, follies, and frolics of the 1970s and 1960s, and even some from the 1950s (for how far back does the history of legal education stretch?) were all quickly rejected as old hat. They were, in Brainerd Currie’s phrase, ‘trite symbols of frustration’.¹ For our subject is governed by a paradox: in general education there is no reported example of an experiment that has ended in failure; in academic law no movement or programme has ever achieved success.

Eventually the Oldest Member spoke up. He had actually looked backward into past numbers of the *Journal of Legal Education* and other forgotten sources:

It was once suggested that 90 per cent of lawyers spend 90 per cent of their time handling facts and that this ought to be reflected in their training.² If 81 per cent of lawyer time is spent on one thing, it follows that 81 per cent of legal education ought to be devoted to it. There have been some isolated courses on fact-finding and the like, but no institution has had a whole programme in which the main emphasis was on facts. I propose that we base our curriculum on this principle and that we call our degree a Bachelor of Facts.

Opposition to this proposal was immediate and predictable.

‘We do it already.’

‘Illiberal!’

‘It’s only common sense. Therefore it is unteachable.’

‘Fact-finding can only be learned by experience.’

‘None of us is competent to teach it.’

‘There are no books.’

‘You cannot study facts in isolation from law.’

‘Law schools should only teach law.’

‘The students would not find it interesting or easy.’

‘The concept of a fact is a crude positivist fiction.’

‘Who would want to go through life labelled a BF?’

The Oldest Member was an experienced academic politician; he had studied not only the *Journal of Legal Education* but also Cornford’s *Microcosmographia Academica* which, as you know, is our special supplement to Machiavelli’s *The Prince*. Adapting the tactic of the Irrelevant Rebuttal, he seized on the objection to the title of the degree and made a crucial concession: ‘It need not be a bachelor’s degree,’ he said; ‘there are good American precedents for calling the undergraduate law degree a doctorate. To call our graduates Doctors of Facts will not only attract students and attention, it will also signal that we are well aware that reality is a social construction and not something out there waiting to be found.’

The opposition having been routed, a curriculum committee was set up to work out the details. To their surprise they learned that the range of potential courses was virtually limitless and, what is more, that there already existed an enormous, if scattered, literature. They submitted a detailed plan for the curriculum, including a full range of options, and added a recommendation that the length of the degree should be increased to five years.

This fantasy was concocted for a seminar on legal education, with two objectives in mind. Professional educators should have no difficulty in satisfying the first objective, that is spotting the dozen (or more) standard educational fallacies illustrated by this hypothetical example. The second objective was to underline the point that the study of evidence, broadly conceived, is potentially a rather large subject. My purpose is to explore some aspects of this latter suggestion and to examine why it has been relatively neglected in most programmes of legal education.

The problem might be stated as follows: at least since the time of Jerome Frank it has been widely acknowledged that an imbalance exists between the amount of attention devoted to disputed questions of law in upper courts and the amount devoted to disputed questions of fact in trials at first instance, in other tribunals, and in legal processes generally. Frank might be interpreted as suggesting that the amount of intellectual energy devoted to a subject varies inversely with its practical importance. His thesis was not restricted to legal education, but covered legal discourse generally: legal research, legal literature, debates about law reform and lawyers’ perceptions of the law, and their underlying assumptions about it. He was inclined to overstatement and used some vulnerable arguments to bolster his case; but it is now very widely accepted that his central thesis was sound.³

Frank’s crusade is by no means unique; it is the most sustained polemic in what has been an almost continuous tradition: this includes the German scholar Hugo

Muensterberg's campaign for scientific experimental psychology;⁴ Albert Osborn's proposal for a Chair of Facts;⁵ and numerous pleas from leading judges, practitioners, and committees. The Ormrod Committee on Legal Education in England explicitly included as one major objective of the first or academic stage 'the intellectual training necessary to enable [the student] to handle facts and apply abstract concepts to them'.⁶ In addition to such general prescriptions, there have been numerous calls for more attention to be paid to specific aspects of fact-handling: recently, for example, Eggleston, Finkelstein, Barnes, and others⁷ have echoed Holmes's argument that 'the man of the future is the man of statistics'⁸ and that the calculus of chances, Bayes' Theorem, and a general ability to spot fallacies and abuses in statistical argument should be part of the basic training of every lawyer. Similarly, numerous specific suggestions are to be found in the literature on clinical legal education⁹ and the recent debates in the United States on lawyer competence.¹⁰ Thus, even before Frank, attempts had been made to right the imbalance that he pinpointed; such attempts have continued, but they do not seem to have caught on in the sense that Evidence, Proof and Fact-finding (hereafter EPF) does not seem to be generally accepted as an integral and central part of the core curriculum nor of legal discourse generally.¹¹

Before considering some specific attempts to deal with the problem, we might at least provisionally indicate the potential scope of the subject. Jerome Michael, who is one of the heroes of our story, summarized his view of the theoretical bases of the arts of controversy as follows:

... since legal controversy is conducted by means of words, you need some knowledge about the use of words as symbols, that is, some grammatical knowledge. Since issues of fact are constituted of contradictory propositions, are formed by the assertion and denial of propositions, and are tried by the proof and disproof of propositions, you need some knowledge of the nature of propositions and of the relationships which can obtain among them, and of the character of issues of fact and of proof and disproof, that is, some logical knowledge. Since the propositions which are material to legal controversy can never be proved to be true or false but only to be probable to some degree and since issues of fact are resolved by the calculation of the relative probabilities of the contradictory propositions of which they are composed, you need some knowledge of the distinction between truth or falsity and probability and of the logic of probability. Since propositions are actual or potential knowledge, since proof or disproof is an affair of knowledge, since, if they are truthful, the parties to legal controversy assert, and witnesses report, their knowledge, and since knowledge is of various sorts, you need some knowledge about knowledge, such, for instance, as knowledge of the distinction between direct or perceptual and indirect or inferential knowledge. Since there are intrinsic and essential differences between law and fact, between propositions about matters of fact and statements about matters of law, and between issues of fact and issues of law and the ways in which they are respectively tried and resolved, you need some knowledge about these matters. Since litigants and all those who participate in the conduct and resolution of their controversies are men and since many of the procedural

rules are based upon presuppositions about human nature and behavior, you need some psychological knowledge. Finally, of course, you need such knowledge as is necessary to enable you to understand the tangential ends which are served by procedural law and to criticize the rules which are designed to serve them.¹²

Michael's list is impressive: it includes the classic trivium of logic, grammar and rhetoric; epistemology; forensic psychology; the detailed exploration of probabilities; the interconnections between law and fact; and the basic concepts, doctrines and policies of the law of evidence. Other pioneers in the field have outlined similar schemes which differ in detail and emphasis. Indeed, there is a continuous intellectual tradition from Bentham, through Wills, Best, Stephen, Thayer, Gulson, Wigmore, Michael and Adler to Leo Levin, Irvin Rutter, and contemporary teachers of law who have treated EPF as an important focus of attention.¹³

When one contemplates the history of this particular tradition, however, one sometimes wonders whether it has been the subject of some peculiar curse. For it reads like the story of Sisyphus who was condemned for ever to roll a heavy boulder up a hill, only to see it roll down just before he reached the top.¹⁴ The study of rhetoric, which had its origins in forensic situations, has been the inspiration of important developments in several disciplines – inductive logic, literary criticism, semantics, even parts of psychology, for example – but it has been forgotten by the discipline of law.¹⁵ James Mill edited Bentham's *Introductory View of Judicial Evidence*, and one third of the work was in proof when the printer took fright because of Bentham's views on jury packing (and possibly his potentially blasphemous critique of oaths), with the result that publication was delayed by some thirty years.¹⁶ Immediately after the young John Stuart Mill had completed the herculean feat of editing Bentham's *magnum opus*, the *Rationale of Judicial Evidence*, he suffered his famous breakdown and substituted Wordsworth's poetry for Bentham's relentlessly intellectual pushpin.¹⁷ Most of Bentham's concepts and basic theoretical analysis have been thoroughly absorbed into the Anglo-American tradition of Evidence scholarship, but his main argument – that all exclusionary rules should be abolished and that fact-finding should be treated as a quintessentially rational process – has gained only limited acceptance.

In 1908, Hugo Muensterberg trumpeted a new era for forensic psychology,¹⁸ only for John Henry Wigmore, the rising star of evidence, to write a satire, laced with most un-Wigmorean wit, which was so effective that it helped to dampen the budding enthusiasm of psychologists – and forensic psychology went to sleep for several decades.¹⁹ Ironically Wigmore himself then moved into the field,²⁰ but more in the mode of a dilettante anthologist, drawing almost as heavily on writings by lawyers and the work of a member of the Indian Civil service, G. F. Arnold, who was neither a lawyer nor a psychologist, as he did on serious empirical research.²¹ During the heyday of the Realist movement, the young Robert Maynard Hutchins collaborated with a psychologist, Donald Slesinger, for a number of years; but after he had been translated precociously to the presidency of the University of Chicago,

Hutchins recanted, suggesting in a remarkable paper entitled ‘The Autobiography of an Ex-Law Student’ that he had been wasting his time.²² In the 1930s Jerome Michael and Mortimer Adler prepared the most elaborate account of the logical and analytical aspects of EPF, entitled *The Nature of Judicial Proof*.²³ This actually reached the stage of being privately printed for limited circulation, but the full version never received full publication, perhaps because commentators, including Wigmore, dismissed it as being of no practical value.²⁴ Wigmore’s own *Principles* [later *Science*] of *Judicial Proof* suffered a rather more bizarre fate. For many years he taught a course on proof at Northwestern University which remains the most systematic and intellectually sophisticated attempt of its kind to deal with the analytical and psychological dimensions of proof in forensic contexts. While Wigmore was dean, his course on proof was a regular part of the curriculum, first as a required course and latterly as an option; after he ceased to be dean, it was relegated to the summer programme. The book of the course was first published in 1913.²⁵ It was well received critically, but so far as I have been able to discover it was never adopted more than once in any other law school during Wigmore’s lifetime. The reason why it went into three editions appears to have been that his publishers, Little, Brown, valued their relationship with Wigmore (for good reason) and Little, Brown salesmen found a modest market among practitioners who treated it as good bedside reading.²⁶ Since the 1930s the pattern has continued. For example, in the late 1950s Leo Levin of the University of Pennsylvania Law School prepared an excellent set of materials, *Evidence and the Behavioral Sciences*, but this too was never published as a book.²⁷ In the 1970s an ambitious project to produce a definitive edition of Bentham’s very extensive writings on evidence – in the eyes of some, one of the most important and least known aspects of his work – was frozen *sine die* for lack of funds.²⁸

So far as legal education is concerned, a similar, less dramatic, pattern is to be discerned. Before 1960, there were some attempts to establish courses on fact-finding and the like in law schools, particularly in America. Almost without exception, like all educational experiments, these have been reported as successes; Jerome Michael at Columbia, Jerome Frank at Yale, Wigmore at Northwestern, Judge Marx and Irvin Rutter at Cincinnati, Marshall Houts at the University of California at Los Angeles (UCLA), and Leo Levin at Pennsylvania are among those who have attempted to develop courses on fact-finding.²⁹ These are fascinating in their diversity, but the more striking fact is that they did not become established; almost without exception they stand as monuments to the ephemeral contributions of individual teachers. They did not become institutionalized, nor did the lessons of experience cumulate. The pattern was perhaps symbolized by staged witness ‘experiments’. The literature abounds with reports along the following lines: a student dressed in a top hat and tails, with a monocle in his left eye, a bottle of champagne on a silverplated salver in the right hand and a gun in the left hand, rushes into the classroom, shouting, ‘You bounder, I have got you at last’; he shoots the teacher and rushes out again, still carrying the champagne. The teacher then rises from the dead and

asks the class to write down an account of what they have just witnessed. Almost invariably they put the monocle in the wrong eye, forget about the champagne, and substitute some other word for 'bounder'. No doubt these so-called eyewitness experiments taught a simple lesson vividly, but even in respect of the method of staging them, knowledge did not *accumulate* on the basis of experience. They remained idiosyncratic, spasmodic, and essentially amateur.³⁰

Some years ago I suggested that legal education had been strongly influenced by two sharply contrasting images of the lawyer: on the one hand, the lofty image of Pericles, the lawgiver, the enlightened policy maker, the wise judge; on the other hand, the image of the lawyer as plumber, a no-nonsense, down-to-earth technician.³¹ My argument, which has sometimes been misunderstood, was that neither image was suitable as a model for the end products of a sane system of legal education and training, and that the influence of these two images, typically in the form of unstated assumptions, has contributed to unnecessary controversy and tensions within legal education. In a nutshell: the academics have often been too lofty, but practitioners have tended to be too mundane. Understanding and practising law are more difficult, more varied, and more interesting than the plumbing image implies; but legal education has no special claim to be suited to the mass production of statesmen.

In respect of EPF there may be something in the view that the plumbing image has been too influential on attempts to respond to calls to take facts more seriously. At least some of the courses described in the literature seem to have concentrated more on specific techniques than on basic, transferable skills, and to have tried to instil skills without an adequate theoretical base. Some have also tried to cover too much ground in a very limited time. In so far as this has been the case, it is hardly surprising. Much of the pressure for teaching courses on fact-handling and the like has come from the practitioners and judges who typically, but by no means universally, express the need in terms of securing minimum competence in respect of immediately usable techniques. The standard academic response to such requests is that formal legal education should concentrate on matters that represent a long-term investment, on understanding as well as skill, on transferable *skills* rather than narrowly focused techniques.³²

Let us consider briefly one of the more carefully worked out courses from this perspective – Wigmore's course on proof. His starting point is a sharp distinction between the rules of admissibility and proof – what he termed 'the ratiocinative process of contentious persuasion'.³³ He adopts the standpoint of the trial advocate at the point when the questions of admissibility have been dealt with and the evidence is all in and 'the counsel sets himself to the ultimate and crucial task, i.e., that of persuading the jury that they should or should not believe the fact alleged in the issue'.³⁴ Stated like this, it sounds as if Wigmore is reviving the ancient art of forensic oratory; in fact his primary educational aim was quite different: it was to develop '*skill in thinking about evidence*'³⁵ and, in particular, of mastering a limited number of types of mental process which bear on systematically analysing a mixed mass of evidence in order to come to a judgement about its probative force for

the case as a whole. To this end Wigmore developed a particular method which is designed, in his words, 'to enable us to lift into consciousness and to state in words the reasons why a total mass of evidence does or should persuade us to a given conclusion and why our conclusion would or should have been different or identical if some part of the total mass had been different'.³⁶

The basis of this method is inductive logic, as expounded by John Stuart Mill, Alfred Sidgwick and Stanley Jevons. The core of the course was a series of exercises in applied inductive logic. The initial exercises deal with analysing examples of different kinds of evidence according to this method, in the course of which Wigmore introduces a considerable amount of psychological and scientific material. All these particular sections are only preliminaries to the finale – an elaborate exercise of analysing a mixed mass of evidence, using records of famous trials as examples. Put simply, a two-stage process is involved: first, all the evidence which the student considers to be potentially relevant, directly or indirectly, to a fact in issue has to be expressed in the form of simple propositions of fact. Each proposition is given a number and becomes part of a 'key list of evidence' for the case. The second stage is to map, using a limited number of symbols, all the significant relationships between all the propositions, and to indicate the author's *belief* about the probative force (or otherwise) of each proposition in relation to its immediate *probandum*. The final result should represent a rational reconstruction of the chart-maker's belief about the significance of each item of evidence and its bearing on the case as a whole.

For several years past I have set undergraduates exercises based on a modified and somewhat diluted version of Wigmorean analysis. Typically, selected *causes célèbres* have provided the raw material – Sacco and Vanzetti, Alger Hiss, Tichborne, Hanratty, and, above all, Bywaters and Thompson, have turned out to be reasonably suitable for this kind of exercise.³⁷ To keep matters under control I have had to lay down a set of artificial ground rules, for example, that no key list should contain fewer than 250 or more than 500 propositions and (after receiving a chart that extended for thirty-seven feet) that no chart should be more than ten feet long.

This is not the place to give a full account of my impressions of the value and the limitations of such exercises. Suffice it to say that although they are extremely time-consuming and are clearly both artificial and academic (in a non-pejorative sense), I am convinced that they are an excellent pedagogical device for a number of purposes: doing such exercises should drive home the lesson that analysis of evidence involves careful exploration of *relations between propositions*; it should help to make the student aware of the complexity of such relations and of the many possibilities of logical jumps and of fallacious reasoning when a mass of evidence is involved. Wigmore's method lays a foundation for a systematic approach to analysing disputed questions of fact; it sets forth a disciplined approach to charting the overall structure of a case, to digging out unstated, often dubious, propositions, and to mapping all the relations between all the relevant evidence. It is not merely a vehicle for giving a grounding in some elementary techniques of analysis,

for it also provides a perspective – a way of looking at evidence and at complex cases which does not come naturally to most students. My impression of student reactions to Wigmore exercises is that many either groaned while they were sweating it out or became obsessed with their particular cases, but that nearly all have been glad to have been through the process and have learned a great deal from it.³⁸

In the present context, Wigmore's *Science* is significant for a number of reasons. First, it represents the most concrete and developed version of an analytical, non-mathematical, approach to problems of forensic proof. Secondly, it purports to integrate logic, forensic psychology, and forensic science into a single coherent scheme. Some of the psychological and scientific material looks rather dated and, to a lesser extent, the same may be said of the logic. But that does not undermine the validity of the general approach. Thirdly, Wigmore's educational objectives are unashamedly vocational, but the main lessons that can be learned from such a study would satisfy the criteria of most liberal educators. There is no conflict.³⁹ However, Wigmore's approach is narrowly focused – it concentrates on one standpoint, the trial advocate, at one moment of time. It concentrates on one point in the totality of legal process. Wigmore filters out many questions and factors that the process school and sceptical students of legal processes would consider to be very important. This, I think, signals a limitation, but does not undermine the validity or the value of the enterprise. Fourthly, it provides a coherent, if not fully argued, theory within a central intellectual tradition – English empiricism – which can be compared and contrasted with perspectives and ideas that fit more easily with other philosophical traditions, such as neo-Kantian, Hegelian, or Marxian approaches.⁴⁰ This last point deserves emphasis: for Wigmore's *Science* provides as good a starting-point as any for exploring a wide range of theoretical issues which he did not himself explore, such as the nature of probabilistic reasoning in forensic contexts, how judgments about the weight of different items of evidence are to be combined, 'holistic' versus 'atomistic' approaches, how 'reality' is constructed in the courtroom, and the nature and purposes of different kinds of legal processes.⁴¹

Wigmore's 'science' is only one – but indubitably the most important – example of an attempt to deal with factual questions seriously and systematically within legal education. Other precedents, of course, are worthy of attention – though none, in my view, are sufficiently comprehensive to go beyond showing what can be done by a systematic approach to one or two particular aspects of this broad field. We do not yet have a blueprint for a comprehensive approach to EPF within legal education, but in the courses and writings of Wigmore, Michael, Levin, Rutter,⁴² Eggleston, Anderson, Schum, and others we have a valuable heritage of relatively sophisticated and diverse precedents. One lesson to be learned from this past experience is that it is unwise to expect to be able to tackle even the basics of all that is encompassed by EPF satisfactorily within the confines of one or two courses.⁴³

Given the quality of much of the thinking and the avowed success of a number of individual courses, why has EPF not been more firmly entrenched in the law

schools? I shall address this question, without attempting to give a comprehensive answer, by looking first at some arguments which are sometimes advanced against extending the study of EPF and then at some other factors in the intellectual climate of law schools that may have contributed to the neglect of an important dimension of academic law.

In the hypothetical example of the Xanadu Law School I implied that the objections that were raised against the proposal for a BF degree were all either fallacious or seriously defective. If we put forward a more modest proposal – that the systematic study of facts in law should have a central, but not dominating, place in undergraduate legal education, for example, there are some rational objections that at least deserve a response. The main arguments can be divided into three categories: (a) the subject is dealt with adequately already; (b) the subject is important but is not dealt with extensively in most law schools because it is unnecessary to devote valuable class time to it; (c) in theory one should devote more time to it, but there are severe difficulties in doing so. Let us call these respectively: the ‘we do it already’, the ‘too soft’, and ‘too hard’ arguments.

The first argument, that enough is done already to teach students the fundamentals of handling facts, was cogently put by Jack B. Weinstein in commenting on issues raised by Jerome Frank and Judge Marx.⁴⁴ Speaking of Columbia in the 1950s, but by implication more generally, he argued that three fundamental ‘fact skills’ were already being taught and that was all that could be expected in a three-year degree. First, students are taught ‘to differentiate between facts which are and which are not materially significant’.⁴⁵ The main vehicle for this was the case method which, claimed Weinstein, ‘is uniquely conceived and designed to build a foundation for an understanding of the relationship of facts to law and for skilful handling of facts’.⁴⁶ This was supplemented at Columbia by Jerome Michael’s more theoretical approach which, alas, has since been largely forgotten.⁴⁷ The second skill, ‘knowledge of how courses of conduct may be planned to shape the material facts’, is dealt with in courses on contracts, tax, trusts and estates, and the like. The third skill, ‘an awareness of how evidence of the facts may be gathered and used in litigation’, is adequately dealt with in courses on procedure and evidence and reinforced by such electives as legal aid work, trial moot courts, and specialized seminars. Beyond that, instruction in fact-handling is unnecessary or else is best left to be learned in practice.⁴⁸

Even in this simplified version (he makes a number of other points), Weinstein’s argument deserves respect. At the very least it suggests that Jerome Frank had exaggerated the extent of the imbalance and that, in its turn, Columbia in the 1950s had implemented at least some of Frank’s suggestions.

A modern successor to Weinstein could with some justification claim that in many law schools his argument could be put with even greater force today: in particular, clinical programmes and trial practice courses have since become more sophisticated and more widespread, and the post-realist ‘process school’ has stimulated a much greater academic awareness and attention to pre-trial aspects of civil and criminal litigation and to such matters as sentencing, parole and arbitration.

I can make only a peremptory reply here to this line of argument. One can readily concede both that Jerome Frank overstated his case and that the situation has improved significantly since his day. But it is just not true that the pleas of Frank and others have been met in a systematic and satisfactory manner. First, Weinstein's conception of the field is narrowly vocational. It is confined to the fundamental 'fact skills' of private practitioners and omits nearly all of the broad or theoretical dimensions outlined by his colleague Jerome Michael. He concentrates on techniques and says almost nothing of more general understanding and criticism.

Secondly, even in respect of the unashamedly vocational teaching of elementary skills, his account of what is involved is too simple. If one takes as baseline for the claim 'we do it already' a more systematic job analysis of what is involved in 'fact-handling' by private practitioners, such as that by Irvin Rutter, few programmes of legal education and training can claim systematically to deal even at an elementary level with the whole range of basic skills of private practitioners – let alone at a more advanced level or with other skills or with the concerns of other participants. It is difficult to generalize, of course, for both programmes and the experience of individual students within a programme even now vary considerably, and there have been significant advances in recent years. What I wish to suggest in general terms is that fact-handling skills, in so far as they are taught directly, are taught less systematically and at a more elementary level than rule-handling skills, and that there is anyway more to legal education than the inculcation of basic skills.

Thirdly, Weinstein was writing about Columbia in 1954, which may in some respects have been exceptionally well off. In particular, Jerome Michael's courses on procedure and analytical aspects of proof represent one of the clear cases of a model that did not catch on. At best his ideas were accepted in a watered-down form, without the rigorous analytical approach on which he insisted; on the whole they have been largely ignored or forgotten.

Weinstein also raises one important issue: how far is it sensible to isolate the study of fact-finding from other substantive and procedural issues? His answer is clear: 'It ought to be distributed throughout the curriculum so that students begin to think of a case in the many different ways that a lawyer might.' This raises a familiar issue over which first-year teachers regularly disagree: the 'direct' versus the 'pick-it-up' approaches to the study of legal method. Suffice it to say here that I am as committed to the direct approach in respect of EPF as I am in respect of orthodox legal analysis and interpretation.⁴⁹ The 'pick-it-up' approach to basic skills typically confuses laying a foundation for mastery of a skill and reinforcing it through practice. Moreover, picking things up tends to proceed in a theoretical vacuum.

The second argument against direct and extensive teaching of EPF is that it is neither necessary nor appropriate for law schools to undertake to teach it. There are several versions of this argument. One is that fact-handling is largely a matter of clear thinking and general knowledge, which should have been adequately developed before law school by general education. Law schools, so the argument goes, should

not take on the mantle of general education, but should confine themselves to law. Accordingly they should deal only with matters which are peculiar to law or which involve special problems of application.

A variant of this argument is more fundamental: we are told that the logic appropriate to reasoning about evidentiary issues is the ordinary inductive reasoning used in everyday practical affairs; that judgements about relevance and about probabilities are based on common sense and the common course of experience;⁵⁰ after all, we entrust some of our most important fact-finding decisions to jurors, ordinary citizens who are without any training – indeed, perhaps because they are untrained. You cannot teach common sense and you should not try to do so.

Some support for this view is to be found in Bentham, who apologized for the obviousness of much of his *Rationale of Judicial Evidence* in the following terms:

So obvious are most of the considerations above presented, so much in the way of everybody's observation, that, under the name of instruction, they have scarce any pretension to be of any use. But, what a man has had in his mind, he has not always at hand at the very moment at which it is wanted: what conveys no instruction, may serve for reminiscence.⁵¹

Another variant is that some aspects of EPF may be considered to be soft options, less intellectually demanding or stimulating than traditional law courses. This is a criticism, often implicit rather than explicit, that has sometimes been made about courses on forensic science and forensic psychology in American law schools and about largely descriptive courses on institutions generally. The argument might be stated as follows: much of the material central to fact-finding is undoubtedly important, but one does not need a course in it to learn the main lessons. It is of course important to be aware, for example, that memory is unreliable, perception is unreliable and is subject to distortion through bias, inattention, and lapse of time, that interrogation can be intrinsically coercive, and that decision makers are likely to have unconscious biases. Do we need to spend scarce and expensive time and resources in a law school to create such awareness? Even when it is not just a matter of common sense, can it not be done just as efficiently through self-education? Provide the student or lawyer with a list of recommended reading – Frank's *Courts on Trial*, Wellman's *The Art of Cross-Examination*, some manuals of advocacy, and standard works on forensic science and forensic psychology – and let them get on with it.⁵²

Perhaps the most important objection to direct teaching of basic skills of fact-handling is an ethical one. Many techniques of the effective advocate are inimical to the traditional values of a university, for they involve the undermining of rational argument rather than its promotion: they include techniques for keeping relevant information out, for trapping or confusing witnesses, for 'laundering' the facts, for diverting attention or interrupting the flow of argument, and for exploiting means of non-rational persuasion. The teacher of advocacy within the academy has an ethical dilemma: it may be appropriate to discuss the ethics of such techniques in

class, but is it compatible with our calling to train students in the skills of non-rational or anti-rational means of persuasion which are a part of *effective* advocacy? Or, for the university teacher, is this a form of *trahison des clercs*?

The argument may be restated as follows:

- 1 In so far as certain skills and knowledge of a general kind need to be taught at all, they should be made a prerequisite for entry to law school.
- 2 In so far as much of what is involved in fact-finding is based on common sense, it is unnecessary to teach it.
- 3 In so far as some relevant knowledge and awareness is easily acquired through general reading or experience, valuable law school time should not be devoted to it.
- 4 In so far as effective fact-handling involves unethical, non-rational, or anti-intellectual skills and techniques and perspectives, it is inappropriate for these to be taught in the academy.

These arguments are powerful and need to be taken into account in planning a sensible programme of education and training and in assessing priorities. But they are by no means dispositive. First, some aspects of clear thinking and general knowledge need to be developed to an especially high standard. To put the same point differently, one of the main claims of case method teaching and of analytical jurisprudence is that they develop *general* powers of reasoning and analysis – distinguishing the relevant from the irrelevant, handling abstract concepts, constructing and sustaining an argument, drawing precise distinctions. Much of the Langdellian tradition depends on the dual claim that lawyers need to be trained to think clearly and that legal materials are a particularly good vehicle for this purpose. Similar claims can be made for the analytical aspects of EPF, but the skills and techniques are not identical. Elucidating the concepts of ‘fact’ or ‘proof’ or ‘relevance’ poses somewhat different problems from elucidating basic legal concepts, such as ‘right’ or ‘cause’ or ‘intention’ or ‘justice’ or ‘law’; and different lessons may be learned in analysing a mixed mass of evidence from analysing a series of reported cases.

Similarly, while some aspects of EPF are indeed quite easily understood and could provide the basis for ‘soft options’, many of its analytical and theoretical dimensions are at least as demanding as anything to be found in the expository and Langdellian traditions of legal education. Furthermore, the problems of understanding the special applications to legal contexts of general principles of clear thinking or general concepts affect questions of fact as well as questions of law.

Nor is it realistic to throw the burden back on general education and law school entrance requirements. To take but one example, most law students and lawyers readily confess to being innumerate: some even boast of it. Yet the mathematicists claim that in arguing about disputed issues of fact one is reasoning about probabilities, and that this kind of reasoning is always in principle mathematical and requires at least an elementary command of basic statistical and related techniques.⁵³ I am not concerned here about the validity of the mathematicist thesis; but I would

suggest that the serious study of reasoning in regard to disputed matters of fact is at least as important and can be at least as intellectually demanding as the study of reasoning in respect of disputed questions of law. In short, the answer to the 'too soft' argument is that the claims of EPF, far from diluting the rigorous core of traditional legal education, would involve a broadening of the scope of analytical studies and, if done well, would make legal education more rather than less demanding.

This also provides at least a partial response to the ethical objection. No doubt, in dealing with advocacy and other aspects of lawyering, teachers as well as practitioners are regularly faced with moral dilemmas, as is illustrated by some of the classic debates in the history of rhetoric. But if one believes that an intellectually sound argument is often the most persuasive argument, or even that good advocacy involves a subtle combination of rational and non-rational means of persuasion, then one has at least a partial answer to the objection. A rigorously intellectual approach to the skills of fact-handling may help to further the cause of promoting rationality in legal processes. A direct approach to the analysis of evidence (and related matters) may also help to illuminate the relations between rational and non-rational factors and different conceptions of rationality. Such an approach belongs to the mainstream of Western university education, for fact-handling is as much a basic human skill as rule-handling. That some such skills may be amoral, immoral, or open to abuse is not a sufficient reason for not dealing with them in the academy. All skills give rise to ethical problems; how to cope with such problems is an issue facing every educator.

The next and converse objection – is that the systematic study of fact-finding is not too soft, but that it is too hard. This argument is more commonly expressed in terms of feasibility rather than of intellectual toughness.⁵⁴ Let us put on one side perennial questions of priorities and of teacher competence, which are best discussed in the context of specific programmes. Two robust maxims will suffice here: 'Questions of priorities should be debated on the merits' and 'If competent teachers cannot be found, they must be made.' Let us rather consider two different versions of the argument about feasibility – the 'no literature' argument and the 'Pandora's Box' argument.

In a rational and orderly world one might expect the natural sequence of development in education to be, first, some initial theorizing; then, research into and a new understanding of narrow areas leading to the publication of specialized studies; next, the publication of general books based on these particular studies; then, the establishment of courses based on the general books. In legal education the process is sometimes reversed: courses precede research and theorizing; general educational books grow out of the courses; detailed particular research follows the general studies. This need not be the case today in respect of EPF, for there is an extraordinarily rich literature – from Aristotle's *Rhetoric* to Perelman's *The New Rhetoric*; from Bentham's great *Rationale* to Wigmore's marvellously entertaining and instructive *Science*; from Mill's *Logic* to Jonathan Cohen's *The Probable and*

the Provable. Forensic science is reasonably well served and there is a burgeoning literature on forensic psychology, on legal process, and on particular topics such as probabilities, identification evidence, and the ethics of advocacy. It may be that manuals on cross-examination and some other aspects of trial practice have not evolved much beyond the cook-book stage,⁵⁵ but there is an enormous and varied secondary legal literature. Orthodox evidence scholarship, although it has tended to be rather narrowly focused, has often been of outstandingly high quality, and there is, of course, the vast heritage of relevant literature from the humanities and social sciences – on epistemology, on logic, on historiography, on the sociology of knowledge, for example.

In addition to the secondary literature, a body of primary material remains to an extraordinary degree underexploited from the point of view of legal research and education – trial records and accounts of *causes célèbres*. It is a striking fact of our intellectual life that these are seen more as a source of entertainment (note, for example, the fate of Wigmore's *Science*) than as raw material for systematic study and analysis. The law teacher's relatively well-developed expertise in using appellate cases as rich, stimulating, and demanding educational material has not been extended to records of trials. The potential uses of this kind of course, the criteria for selection, and the kinds of skills and awareness it can help to develop are, in some respects, significantly different from the law reports.⁵⁶ The human element is more clearly displayed in trial records, for example; the law reports are more compact and have special status as authorities. But, from a pedagogical point of view, they are quite closely related species of the same genus – case-studies; they are concrete, often dramatic, dialectical examples, which can be analysed in numerous ways. They can be used to illustrate general ideas, but they are anecdotal and as such they can be almost systematically misleading. The most interesting cases are typically atypical and, as has often been pointed out, the case-trained lawyer is in danger of having a distorted picture of the world in which the pathological and the exotic obscure the healthy and the routine.

Thus it is just not true that there is not an adequate literature on which to base a significantly expanded study of EPF within a broadened conception of academic law. It is nearer the mark to say that a potentially rich body of literature has been almost systematically neglected. It is symptomatic of this neglect that some of the most significant works in the field have either gone out of print or were never even published.⁵⁷ It is also symptomatic of neglect that, by and large, law teachers have so far failed to develop anything like the same level of pedagogical sophistication in selecting, presenting, and using trial records as they have done in respect of the law reports. The literature is there, but it has yet to be exploited.

But, it will be objected, you are opening Pandora's Box. Pursue this line and all knowledge becomes your province: epistemology, logic, statistics, historiography, psychology, all the behavioural sciences, and heaven knows what else will escape and swamp us. Let us stick to what we can do well; let us keep the clamp down on the lid or we shall be assaulted by reality. Maybe I dismissed too summarily the notion

that the gods are angry. Could it be that the sad story of the publishing history of theorizing about evidence by lawyers, of all those aborted projects and *culs-de-sac*, were small thunderbolts from heaven, shots across the bows warning academic lawyers to keep off? There is after all the precedent of Prometheus who stole fire from Olympus and opened the eyes of humankind by asking a lot of awkward questions. Is not taking a serious interest in facts rather like that? What is truth? What is proof? What part can reason play in adjudication? Is judicial process really concerned with truth? All the endless concerns of the humanities with knowledge, reality and reason are threatening to break in. Start opening up these questions and you are lost.

Back to earth. There are no gods to anger, but the fears are not groundless: it is the case that the potential ramifications of EPF are endless and taking facts seriously is a daunting prospect. Jerome Frank's position on this is quite clear: the elusiveness and complexity of the world of facts is a central part of the lawyer's world. One can either duck or confront reality. Frank is a confronter *par excellence*, his recipe the American equivalent of the stiff upper lip, a Freudian notion of maturity.⁵⁸ The completely adult jurist acknowledges the difficulties and gets on with the job. In this view the main objection to the orthodox tradition of Evidence scholarship is that it evades the difficult problems. It is a tradition of relatively complacent commonsense empiricism that concentrates on the most formal and most public part of judicial processes and has devoted far more attention to the rules of admissibility than to questions about the collection, processing, presentation, and weighing of information that reaches the decision makers. The rationality of the process is by and large assumed; the elusiveness of reality is barely acknowledged. There is again a good precedent in jesting Pilate. What is truth? asked the evidence scholars, and would not stay for an answer.

Let me restate my response to the four main arguments against a modest version of the Frank thesis. To the claim 'we do it already', my reply is that this is only partly true and that rarely is fact-finding as such directly studied in a systematic, comprehensive and rigorous manner. To the 'too soft' or 'unnecessary' argument, my reply is that this is also partly true, but that there are important aspects of EPF for which almost identical claims can be made as for those aspects of traditional legal education, which are considered to be both practically important and intellectually demanding. To the 'unethical' argument, my reply is much the same: the problem is not peculiar to fact studies. To the 'too hard' argument, my response is that in so far as these are arguments about feasibility they are unconvincing; in so far as they are objections on grounds of intellectual difficulty they are despicable; and in so far as they are objections on grounds of absence of a suitable literature they are incorrect. The strongest response to 'it can't be done' is to point out that it has been done – often rather well. In so far as the argument is one about priorities – for example, that there is no time to fit this extra material in – I merely wish to suggest that the claims of EPF should be considered on the merits. It is not self-evident that the study of the rules of evidence deserves a higher priority than the principles of proof or that appellate cases are *ipso facto* better pedagogical material than trial records.

While there is some force in the objections so far considered, I do not accept them as satisfactory justifications for the *status quo*. Nor on their own do they provide a plausible explanation for the relative failure of responses to the repeated pleas for a righting of the imbalance. Nor do I think that academic conservatism and inertia, no doubt potent factors, provide the missing link. Without claiming to be exhaustive, I wish to consider briefly two further related contributory factors: the gravitational pull of the rule-centred tradition of academic law and the failure of its critics to construct a *coherent* theoretical alternative in respect of EPF.

One interpretation of the American Realist Movement, of which Frank is generally regarded as a leading member, is that it represented a rather diverse and loosely coordinated series of reactions against rule-dominated notions of academic law, exemplified by Langdellism in the United States and the expository orthodoxy in the United Kingdom. According to this view the Realists were reacting against an orthodoxy, but their grounds for criticizing or rejecting that orthodoxy were diverse. On the positive side they shared one single idea, which can be expressed as a truism: there is more to the study of law than the study of rules. It is a caricature of almost all Realists to attribute to them the view that rules are a myth or are merely predictions or are unimportant, just as it is a caricature of many expositors to suggest that they seriously deny the central truism that united Realists. The reasons for the dissatisfaction of the Realists with the orthodoxy were diverse in crucial respects – one basic concern was practitioner-oriented: how to narrow the gap between academic law and the day-to-day realities of legal practice? Another was scientific: how to develop an empirical, research-oriented science of law quite far removed from the day-to-day concerns of practitioners? Some Realists were concerned to criticize existing legal institutions, rules, and practices with a view to reform. Failure to perceive this diversity of concerns obscured the crucial point that a corresponding diversity of alternative solutions or programmes was indicated. Constructing a more enlightened system of vocational training is a very different enterprise from developing an empirical science of law or a basis for a reformist or radical critique of the legal order.⁵⁹

Part of the toughness of the expository orthodoxy was that it had (or was thought to have) a strong internal coherence; law is a system of rules, and the study of law involves the exposition, the analysis, and occasionally the evaluation of those rules. The raw material for this study is primary sources of law; the central questions were disputed questions of law. Concessions could be, and were, made to demands to raise wider issues, to include non-legal materials and so on, but it was clear that these belonged to the periphery rather than the centre. In respect of the core curriculum the starting-point and the main subject of study were rules. It was accordingly natural that the study of evidence was equated with reasoning about questions of law. The toughness of the tradition was due in large part to its coherence.

When such Realists as Holmes, Frank and Llewellyn opened Pandora's Box they seemed to be letting loose an almost limitless number of possible avenues of enquiry. If the study of rules alone is not enough, what is enough? The danger was that nothing

was to be excluded, everything was relevant. In order to cope, this problem had to be confronted and new *coherences* had to be developed. Unfortunately some of the leaders, such as Holmes and Frank, were stronger on diagnosis than they were on prescription – neither of them ever worked out the full implications of their position in terms of coherent programmes for legal education, legal research or law reform.⁶⁰ Karl Llewellyn, it has been suggested with some justification, retreated in his later years to the relatively safe ground of the Uniform Commercial Code and the study of appellate courts. Scientists such as Cook and Moore underestimated the magnitude and difficulty of the tasks they had set themselves. There were some notable particular achievements, but they were fragmented and diverse. No new core or cores were established.

One reason for this failure was a failure of theory. For one major function of theorizing is to provide coherence – to map connections and to develop a systematic, internally consistent overview. But, by and large, the Realists failed to do this. They pursued some of the particular hares (and other creatures) that they had let loose when they lifted the lid, but they failed to marshal these diverse creatures into any sort of order.

In respect of this kind of organizing theory, evidence has been better served than most. Bentham's theory of evidence purports to integrate the logic, psychology and philosophy of evidence, and makes the case for having no binding exclusionary rules. Moreover, Bentham's theory of evidence is subsumed under a theory of adjudication which in turn has its place within the Constitutional Code as part of his general theory of law.⁶¹ Wigmore's theory of proof, although more narrowly focused, integrates the study of the logic and psychology of proof and forensic science with evidence doctrine. Both belong to a tradition of rather optimistic rationalism about legal process, are unduly court-minded and, as one would expect, are outdated in a number of ways. Nevertheless the legacy of Bentham and Wigmore (and of other theorists) provides an impressive foundation from which to start to develop a systematic mapping theory of EPF as part of a broadened conception of academic law.

Such a theory may help to provide the coherence that is needed if alternatives to the rule-dominated tradition are to have much staying power. Such a theory needs to be conceived, in first instance, independently of its educational implications⁶² – for over-concern with the day-to-day realities and constraints of academic life can have a distorting effect on theory construction. But some of the basic foundations exist for the development of a coherent theory of EPF within the framework of a broad approach to academic law.⁶³ When such a theory is developed, then it may be that Jerome Frank's vision – in its saner aspects – will be realized in practice.

* This essay, a revised version of an address delivered at the ceremonies celebrating the opening of the Begbie Building, Faculty of Law, University of Victoria, BC, in November 1980, was published in N. Gold (1982) and in (1984) 34 Jo Leg Ed 22. It is reprinted here by kind permission of Butterworth & Co., Toronto. The informal style of an address has been retained.

- 1 Currie (1955), 4.
- 2 Recent research suggests that the Oldest Member may have been exaggerating. A particularly suggestive study which has a bearing on several issues in this paper is Zemans (1980). See further Zemans and Rosenblum (1981).
- 3 See generally Frank (1930, 1933, 1949). See further below, ch. 4.
- 4 Muensterberg (1908).
- 5 Osborn (1922).
- 6 Report of the Committee on Legal Education, Cmnd 4595 (1971), 94; for other examples see Marx (1953). The Marre Report (1988) lists twenty-four legal skills, including '(6) An ability to isolate elementary logical and statistical fallacies', '(9) An ability to ascertain and verify the relevant facts of any legal problem' and '(10) An ability to analyse facts and to be able to construct and criticise an argument on a disputed question of fact'. Strangely, it concludes that (6) and (9) should be taught at the academic stage, but that (10) should be among those taught at the vocational stage (paras. 12, 21–3).
- 7 Eggleston (1983); Finkelstein (1978); Cullison (1969); Barnes (1983). For a critique of 'mathematicist' approaches, see L. J. Cohen (1977). See further below, 74, 125–30 and Twining (1980b).
- 8 Holmes (1897).
- 9 See the useful bibliographies by Snyman (1979) and Watt (1989).
- 10 See, for example, American Bar Association (1979).
- 11 It is argued below (ch. 7) that for some purposes a broader category, covering the processing and uses of information in important decisions in litigation (IL), is preferable to EPF.
- 12 Michael (1948).
- 13 On Bentham see n. 16 below; on Wigmore see n. 20 below; on Michael see n. 23 below; on Levin see n. 27 below; on Rutter see n. 29 below. Classic works in the Anglo–American tradition include: Wills (1838); Best (1849); J. F. Stephen (1872); Gulson (1905). For a useful historical survey see 1 Wigmore *Treatise*, s. 8. Almost without exception these concentrate on disputed questions of fact in litigation ('legal controversy') on the basis of a number of largely shared assumptions about the nature of adjudication and of what is involved in 'rational' fact determination. This shared perspective can be characterized as 'optimistic rationalism', see below, ch. 3.
- 14 A similar pattern in law and the social sciences is discussed by Kalven (1958).
- 15 Below, ch. 3.
- 16 Bentham VI *Works*. The proof of the unpublished printing of 1812 of approximately the first third of *An Introductory View* survives in the Bentham mss at University College, London. A sheet dated 1822 states that the printing was stopped 'owing to the disappearance of some papers which have since been recovered'. James Mill's biographer suggests that booksellers feared prosecution because of Bentham's critique of jury packing (Bain (1882), 120); Bentham's famous discussion of oaths, *Swear Not at All*, was originally written as part of the *Introductory View*. It was printed separately in 1813, but publication was postponed until 1817. For Bentham's account, see V *Works* 189. I am indebted to Ian Morrison for much of the information in this note. Recent research by Andrew Lewis casts doubt on the claim that James Mill edited *An Introductory View*.

- 17 Bentham, *Rationale* (1827); J. S. Mill, *Autobiography* (1873).
- 18 Above, n. 4.
- 19 Wigmore (1909). See also C. C. Moore (1907); Moore, a practitioner, was himself author of a remarkable work, *A Treatise on Facts* (1908). Wigmore, while praising the work in general terms, criticized Moore for suggesting that rules of law can determine the weight or credibility of testimony Wigmore (1908b).
- 20 Wigmore *Science*.
- 21 Arnold (1906) (2nd edn, 1913).
- 22 Hutchins and Slesinger (1928a, 1928b, 1929a, 1929c); Hutchins (1933). These articles are discussed in Schlegel (1979).
- 23 Michael and Adler (1931). The foreword states: 'This is not a book. It is merely galley proof, which after considerable revision and elaboration will become a book, and it is being put forth in this form so that the authors can use it in classes which they are now conducting. It is not intended for wider circulation.' Some of the material was later used in articles and other writings by the two authors; see especially Michael and Adler (1934, 1952) and Michael (1948).
- 24 Wigmore above, n. 20; 3rd edn, 6, n. 1.
- 25 Wigmore, above, n. 20.
- 26 The information about the fate of Wigmore's *Science* is taken from the Wigmore Papers at Northwestern University Law School and Roalfe (1977).
- 27 A. Leo Levin (1956), discussed in Levin (1958).
- 28 On the Bentham Project see reports in the *Bentham Newsletter*, 1978–88. Editorial work has been restarted on *An Introductory View* [and *The Rationale*].
- 29 Marx, above, n. 6; Houts (1955, 1956); Michael, n. 23; Rutter (1961); Levin, above, n. 27. The coverage of Frank's course at Yale approximated to the topics dealt with in *Courts on Trial* (1949).
- 30 For published accounts of demonstrations and 'experiments' in the classroom, see e.g. Wigmore (1931) (2nd edn), 532–40; Roalfe (1977), 56; Houts (1956), ch. 1; Merrills (1971). On research in this area see especially Trankell (1972); Damaska (1975); Clifford and Bull (1978); Loftus (1979); Lloyd-Bostock (1988a). See further below, ch. 5.
- 31 Twining (1967).
- 32 On the distinction between 'skills' and 'techniques', see Rutter (1961), Gold et al. (1989).
- 33 Wigmore *Science* (1937), 5.
- 34 Ibid., 6.
- 35 Ibid., 7.
- 36 Ibid., 8. [See above 12 n. 15.]
- 37 Wigmore provides a list of trials useful for study in the appendices of the 2nd and 3rd editions of the *Principles of Proof*, together with a list of historical problems susceptible to the same kind of analysis. Professor Terence Anderson of the University of Miami Law School has used National Trial Competition problems and other such materials as the basis for exercises in Wigmorean analysis from the standpoint of a lawyer preparing for trial. Although Wigmore *claimed* to be adopting the standpoint of the trial attorney during trials, by using inert records he often switched to the standpoint of a historian. See also *TEBW* and *Analysis* and below, ch. 12.

- 38 Lord Wright (1938) in an enthusiastic review of Wigmore's *Science*, wrote: 'I have asked myself whether I should have done my work any better if I had studied the book in earlier days, not merely for information, but for living mastery of the principles so as to apply and use them. I think the answer should be in the affirmative. Rule of thumb is all very well, especially in a subject like legal proof . . . But all the same, the logic is there. A workman is all the better if he knows and understands his tools as scientifically as he can.'
- 39 This theme is developed in Twining (1988b).
- 40 For an evaluation of the educational and other uses and limitations of Wigmore's method see *TEBW* [and *Analysis* (2005) preface and 141–2].
- 41 These themes are developed in later essays in this book.
- 42 The 1982 version of this paper, see above n. *, contains a discussion of Rutter's approach.
- 43 In addition to those already mentioned, contemporary precedents include Sir Richard Eggleston's courses at Monash University, Terence Anderson's Evidence Workshop at the University of Miami, David Schum's work at Rice University (see Schum and Martin (1982)), and my own courses at Warwick and London. These are just a sample of university-based courses. Anderson, Schum and Twining all build on Wigmore's *Science*. Some relatively new types of vocational training courses that developed during the 1970s in many common law jurisdictions devote a substantial amount of time to aspects of 'fact management', typically without resort to such terms. An exception is the new Vocational Course for the Bar, run by the Council of Legal Education in London, which emphasizes the attainment of minimum competence in the practical skills expected of junior barristers. See generally, Gold, Mackie and Twining (eds.) (1989).
- 44 Weinstein (1955), discussing Marx, above, n. 6, and Frank's thesis, above, n. 3.
- 45 Weinstein, *ibid.*, 464.
- 46 *Ibid.*, 465.
- 47 *Ibid.*
- 48 *Ibid.*, 464.
- 49 See Twining and Miers (1982), Preface. In respect of skills, a direct approach postulates the need to allocate time (a substantial part of a course on legal method would, in some contexts, be adequate) and to isolate relevant aspects of EPF for study. This is not inconsistent with advocating 'a pervasive approach' in other courses for purposes of reinforcing and extending such basic skills. A strong case can be made for direct study of several aspects of EPF, in addition to what is already done in curricula of the kind postulated by Weinstein.
- 50 See below, chs. 3 and 4.
- 51 Bentham (1827), 182; cf. Bentham (1825), 269: 'There would be no absurdity in inserting in a course of law, and, above all, in a treatise on the judicial art, a summary of the laws of nature, as applicable to different questions which may arise before judges; but it ought to be presumed, that the men who are elevated to high judicial functions, have passed through the schools of philosophy.'
- 52 See *Works*, cited above, n. 16.
- 53 On the debate between 'mathematicists' and Baconians, see below, 125–30.
- 54 In conversation with teachers of evidence in the United Kingdom, the United States and Canada I have found that the two most commonly articulated objections to extending

the study of evidence and proof beyond the rules of evidence are that (a) professional examinations concentrate on the rules and (b) law teachers are not competent to teach the logical, psychological and other aspects of a broadened conception of EPF. In respect of (a), one object of this paper is to make the case for change in the long term; meanwhile professional requirements need not so directly limit the extension of the study of EPF within law schools. In respect of (b) my impression is that lack of confidence is more of an obstacle than lack of competence. Several reviewers of Wigmore's *Science* attributed its neglect to 'the real or imagined incompetence' of law teachers to deal with the subject; see, for example (1932) 30 Mich L Rev 1354.

- 55 See Rutter (1961), 312–16. Since this essay was first published there have been very significant developments in the literature, as is illustrated by references in the footnotes above.
- 56 This thesis is developed in Twining (1986d) and *The Reading Law Cook-Book LIC*, ch. 11.
- 57 However, Bentham's *Rationale of Judicial Evidence* has been reprinted in a facsimile edition as part of *Classics of English Legal History in the Modern Era* (New York, 1978); Wigmore *Science* (3rd edn) is available in photocopy or microfilm from University Microfilms International. Michael and Adler's work is not so accessible, except in their excellent series of articles cited above, n. 23. Levin's mimeographed materials are to be found in a number of law libraries in the United States.
- 58 See especially Frank (1930).
- 59 See generally, Twining (1973a).
- 60 On Holmes, see Twining (1973b). See Frank (1949), ch. 16 and at 422–3, and (1947) for his prescriptions.
- 61 See especially Halévy ((1928): 1955 edn.) at 373–431 and Postema (1977).
- 62 *TEBW*, ch. 2.
- 63 Cf. Kalven, above, n. 14, on the odd and mistaken view 'that the only test of relevance of research in the law school world is whether you can teach it'.

The Rationalist Tradition of Evidence Scholarship*

What was formerly 'tried' by the method of force or the mechanical following of form
is now tried by the method of reason. Thayer¹

At the start of Shakespeare's *Richard II* Bolingbroke and Mowbray, Duke of Norfolk, are called before the King 'to appeal each other of high treason'. Each of the disputants is anxious to defend his honour and to prove the other a traitor in the lists. Before they come before him, Richard asks Gaunt if this dispute is based on ancient malice or 'worthily, as a good subject should, on some known ground of treachery in him'. Gaunt replies that, 'as near as I could sift him on the argument', there is no inveterate malice, but apparent danger to the King. Richard responds:

Then call them to our presence; face to face
And frowning brow to brow, ourselves will hear
The accuser and the accused, freely speak.

Only after they have had their say and Richard and others have failed to persuade them to make up, does he reluctantly agree to let

... your swords and lances arbitrate
The swelling difference of your settled hate.²

They reassemble at Coventry ready for battle, but the King intervenes at the last moment to stop the fight and to banish both disputants, a classic example of a disastrous attempt at peaceful dispute-settlement.

We need not here concern ourselves with the detailed accuracy of Shakespeare's account of the proceedings, nor with whether this mode of dispute-settlement can appropriately be said to have involved a 'trial', political or otherwise.³ But it is worth noting some of the ingredients of this example of a manner of proceeding which is conventionally termed 'irrational': insistence on a specific charge; confrontation of accused and accuser before authority; the opportunity for each side to be heard; arguments 'sifted' (twice);⁴ attempts to persuade the parties to settle the dispute peacefully; ultimate control over each stage of the proceedings by lawful authority in the person of the King, but the original initiative and some of the decisions on how to proceed in the control of the parties. It is a formal adversary process, supervised

by authority, involving argument and decision at most stages. The main ‘irrational’ element, the proof by force of arms, is seen as a last resort and is framed in terms of appeals to God to defend the righteous contender.

In given circumstances there may be reasons for choosing to settle a dispute or disagreement or competition or game by means other than reasoning and argument, for example by tossing a coin or by fighting or by granting victory to the side which scores the most goals or by considering the result of plunging a person’s arm in boiling oil. One may seek to justify the choice of means with reasons, but the means are not themselves considered ‘rational’ in Thayer’s sense. The ‘rational’ system is one which uses reason, so far as is feasible, in determination of disputed questions of fact and law. This particular view of rationality is succinctly summarized by Thayer as follows: ‘Any determination by a court which weighs (the) testimony or other evidence in the scale of reason, and decides a litigated question as it is decided now.’⁵

The purpose of this chapter is to examine some of the background to contemporary studies of evidence and proof, by considering both historically and analytically some highlights of the development of the specialized study of evidence in England and the United States. The next section presents an historical overview in the form of brief surveys of the work of selected writers within this tradition. The third section contains a restatement of some of the basic assumptions about fact-finding in adjudication that appear by and large to have been shared by almost all of the leading specialist writers on evidence. They can be said to have a shared underlying theory that may be characterized as optimistic rationalism. There is a sharp contrast both in tone and emphasis between orthodox literature on evidence and much recent writing on judicial process, but it will be argued in chapter 4 that the differences may not be so great as they appear on the surface.

Anglo–American evidence scholarship: an historical overview

It is not necessary for present purposes to attempt to trace all aspects of the intellectual history of the study of Evidence. Such an account would have to include the contributions of classical and medieval rhetoric, the debates on the numerical system of proof in Europe, the history of probability theory, the emergence of forensic science and forensic psychology in the late nineteenth century and much else besides.⁶ But it is instructive to consider in outline the history of the specialized study of evidence in the Anglo–American tradition between the publication in 1734 of Gilbert’s *The Law of Evidence* and the death of Wigmore in 1943. For convenience of exposition, the story can be roughly divided into four periods: (a) the period before 1800; (b) the period 1800–50, marked by the writings of Bentham, the establishment of the first generation of English treatises, and the first round of public debates on reform of the law of evidence; (c) the period 1850–1900, during which further debates on reform took place in England, India and the United States, and the first generation of American Evidence scholars emerged and began to

dominate the field; and (d) the period 1900–60 which is dominated by Wigmore.⁷ The survey which follows deals with selected writers from Gilbert to Wigmore with a few deviations from strict chronological order for convenience of exposition.

Before 1800

Problems of proof are as old and as pervasive as the law itself: one would accordingly expect them to be reflected even in the earliest legal literature. So far as England is concerned this is true only in a very restricted sense. For the development of a substantial body of literature devoted to evidence and proof as such is a relatively late phenomenon. There are several reasons for this: for a remarkably long time the main methods by which disputed questions of fact were dealt with did not require a system of evidence; the early methods of ordeal, battle and compurgation and the emerging jury did not require decisions by tribunals that had no first-hand knowledge of the alleged facts. The early history of the rules of evidence is the story of the emergence of different doctrines in different periods; the conclusiveness of documents under seal was an early development; the rules concerning competency of witnesses – an important battleground in the nineteenth century – were largely established in the sixteenth century; the privilege against self-incrimination took root in the common law in the seventeenth century; there is much debate about the origins of the hearsay rule, but it is reasonably clear that it did not become firmly established until after 1600. Each rule of evidence has its own, sometimes obscure, often convoluted, history. Sometimes isolated precedents anticipate the recognition of a practice, and practice precedes the articulation of doctrine. In the case of the law of evidence what is sometimes referred to as ‘the modern system’ was to a large extent a late eighteenth century and early nineteenth century creation, fashioned by secondary writers from materials spanning several centuries.

In 1794 at the trial of Warren Hastings, Burke is reported as saying: ‘It was true, something had been written on the law of Evidence, but very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes.’⁸

Making due allowance for the rhetorical exaggeration of a non-lawyer advocate, this is not far removed from contemporary professional perceptions of the law of evidence. The first important treatise, by Gilbert, attempted to subsume the whole of the law under a single principle, the ‘best evidence rule’. Buller’s *Nisi Prius*, a very influential work, summarized the rules of evidence first in nine and later in twelve propositions; if one looks in Comyn’s *Digest* under ‘Evidence’, even as late as the edition of 1822, one is referred to ‘Testmoigne’, which takes up less than forty pages of what was by then an eight-volume encyclopaedia. Blackstone devoted little more than ten pages to the subject.

There are several reasons for this perception of evidence as a rudimentary branch of law. First, precedents later seen to be relevant were scattered throughout the reports and digests. In the seventeenth century, practice books such as those of

Style and Duncombe collected together some cases under the heading of 'Evidence'; early treatises on criminal law by Hale (1682) and Hawkins (1716) had separate chapters devoted to the topic. But before 1800 lengthy treatments of evidence as a distinct subject were almost unknown. A digest of the *Law of Evidence*, published in 1717 and attributed to William Nelson, may have been the earliest example. An anonymous work on *The Theory of Evidence* was published in 1761 and was later blamed, along with Gilbert, for the popularization of the 'best evidence rule', a source of continuous difficulty for nineteenth-century writers. The author is thought to be Henry Bathurst, who later became Lord Chancellor (1771–8); much of his work was subsequently incorporated in an introduction of the *Law of Evidence Relative to Trials at Nisi Prius*, first published, also anonymously, by Bathurst's nephew, Francis Buller, in 1772. A few works, long since forgotten, such as Morgan's *Essays of the Law of Evidence* (1789), in three volumes, appeared, but seem to have made little impact. By far the most important separate work on evidence before 1800 was Gilbert's treatise, *The Law of Evidence*, which will be discussed below.

Neither the separate treatises nor the works which devoted attention specifically to evidence as part of some broader topic, presented the subject in a systematic fashion. Even Gilbert, by far the most systematic, is not much more than a digest of cases collected together under a few pithy, loosely connected, general propositions. At the time Burke spoke there was some justification for believing that Evidence, as reflected in the secondary literature, deserved to be treated as a 'non-subject'.

There is one further factor which helps to explain professional perceptions of the matter at the end of the eighteenth century. This was the expansion of law reporting, especially at Nisi Prius. Wigmore puts the matter as follows:

A.D. 1790–1830. The full spring-tide of the system had now arrived. In the ensuing generation the established principles began to be developed into rules and precedents of minutiae relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centering around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain: it was the increase of printed reports of Nisi Prius rulings.⁹

Gilbert

Gilbert was Lord Chief Baron of the Court of Exchequer from 1722 until his death in 1726. He was a prolific writer, but nearly all of his works were published posthumously. *The Law of Evidence* was published in several editions, the first in Dublin in 1754, the last in London in 1801, edited by J. Sedgwick. It is a tribute to the quality and originality of the work that it survived a thirty-year delay in publication to become what was perhaps the single most important work on evidence before Bentham. Gilbert's style is simple and cogent, but the key to his success lay in the fact that he set out to establish a tightly integrated theory of evidence based on the notion of probability. *The Law of Evidence* begins with Locke:

In the first Place, it has been observed by a very learned Man, that there are several Degrees from perfect Certainty and Demonstration, quite down to Improbability and Unlikeliness, even to the Confines of Impossibility; and there are several Acts of the Mind proportion'd to these Degrees of Evidence, which may be called the Degrees of Assent, from full assurance and Confidence, quite down to Conjecture, Doubt, Distrust and Disbelief.¹⁰

Demonstration is based on the clear and direct perception of permanent things by 'a Man's own proper senses'. The affairs of life allow only exceptionally of demonstration because they are generally concerned with transient actions which often are not clearly perceived or are reported by others. Accordingly the rights of men in civil life have to be determined on the basis of something less than demonstration, that is judgements of probability. Gilbert set out to erect a theory of evidence in trials on the foundation of this explicitly Lockean theory of knowledge:

The first therefore, and most signal Rule, in Relation to Evidence, is this, That a Man must have the utmost Evidence the Nature of the Fact is capable of, for the Design of the Law is to come to rigid Demonstration in Matters of Right, and there can be no Demonstration of a Fact without the best Evidence that the Nature of the Thing is capable of.¹¹

Taking this very general and rather rigid formulation of the 'best evidence rule', which he purported to derive from Holt, Gilbert proceeded to establish various categories of evidence and to grade them in terms of probabilities in something approaching a formal hierarchy, with Public Records at the top, as the very best evidence.

The Law of Evidence was recognized as the leading work on the subject for about fifty years after its first publication in 1754 and was reissued on at least four occasions between 1791 and 1801. This was not merely a commercial success. Bathurst used it as a model; Peake, the author of the first important nineteenth-century treatise, made handsome acknowledgement of Gilbert's influence, as did several other later writers. Blackstone, who delicately sidestepped 'the numerous niceties and distinctions' of the law of evidence, referred his readers to Gilbert's treatise as 'a work which it is impossible to abstract or abridge without losing some beauty and destroying the chain as a whole'.¹² Gilbert was seen by his admirers as having presented the law of evidence within a coherent theoretical framework and in a clear, succinct and useful form. It was partly for this reason that Bentham was provoked into a venomous attack.

'False Theory of Evidence (Gilbert's)' is the subject of chapter 31 and Appendix C of Bentham's *An Introductory View*, written between 1802 and 1809, but not published until some thirty years later.¹³ According to Bentham the efficient cause of Gilbert's error was a defective scheme of arrangement; the final cause was the sinister interest of the legal fraternity to throw and keep the subject in confusion; the result a false theory which, *inter alia*, erroneously gives precedence to written over

oral evidence. By making the distinction between written and oral evidence the foundation of their system, Gilbert and his successors were led into several errors: they overlook real evidence, give insufficient attention to circumstantial evidence and ignore several crucial distinctions. For example, Gilbert failed to discriminate between various kinds of makeshift and pre-appointed evidence. The error of ranking written evidence above unwritten is based on confusing verity and authenticity of documents. It may be the case that few records are not authentic, but many of them are clearly unreliable. Gilbert had placed first in his hierarchy of probability the legal memorials of the legislature and of the king's courts of justice deposited at the Treasury of Westminster. Mocking the Chief Baron's love of mathematics, Bentham suggests that Gilbert treats records as 'a diagram for the demonstration of right' produced by a 'supersacred and super-human class of persons'.¹⁴ But officials are but men, whose trustworthiness needs to be determined by the same tests as any other men; and legal records are notoriously unreliable, 'compounds or reservoirs of truths and lies undistinguishably shaken together, penned by nobody knows who, and kept under the orders, how seldom soever, if ever, actually subjected to the eyes of the judges of Westminster Hall'.¹⁵ They are, moreover, the repositories of legal fictions and so, in Bentham's eyes, particularly suspect.¹⁶ After criticizing other aspects of Gilbert's hierarchy, he concludes: 'In the same strain of anility, garrulity, narrow-mindedness, absurdity, perpetual misrepresentation, and indefatigable self-contradiction, runs the whole of this work, from which men are to understand the true theory of evidence.'¹⁷

Bentham's attack on Gilbert's theory is as sharp as any to be found in his often polemical writings on evidence. *En passant* he takes sideswipes at some familiar targets – legal fictions, judge-made law, the double-fountain of Law and Equity, and the sinister interest in mystification of 'Judge and Co.'. The main target is ostensibly Gilbert's scheme of classification, but the real object of attack is the attempt to regulate judgements of probability by formal rules.

In an important sense one of Gilbert's principal achievements was to provide Bentham with an identifiable target to attack. Before Gilbert there was hardly a 'law of evidence' to criticize. As the most coherent and the most influential expositor of this branch of law Gilbert provided an important focus of attention. Furthermore his theory was clearly false in Bentham's eyes. The immediate source of error was a defective scheme of classification, but the core of the matter was the suggestion that the weighing of evidence could be governed by rigid rules. By talking in terms of 'rules of probability' Gilbert had conflated questions of admissibility and questions of weight, and had suggested that both kinds of question could be governed by formal rules, whereas Bentham believed that the former should not be and the latter could not be. What a modern commentator has termed 'misplaced mathematicization'¹⁸ was just one more symptom of a generally flawed attempt to formalize a subject that was literally ungovernable. The attractive simplicity and seeming elegance of Gilbert's theory no doubt made it seem all the more dangerous.

To a large extent Bentham's critique has been confirmed by the judgement of history, even though his own arguments were not published until after his death, and have since attracted little attention. Most of Gilbert's successors, both judges and treatise writers, including Peake, Phillipps, Starkie, Greenleaf, Taylor, Best, treated the 'best evidence rule' as a fundamental principle. Some struggled to free themselves from the straitjacket, first by restricting its scope and then by reducing its status from a rigid rule to a prudential maxim. But during the nineteenth century, as Thayer was eventually to point out, it became even more rigid by being transformed from a positive admonition to adduce the most reliable kind of evidence, especially in respect of documents, to a rigid rule of exclusion, sometimes leading to the loss of valuable evidence, sometimes to complicated distinctions and exceptions.¹⁹ Thayer concludes that 'Gilbert in his premature, ambitious and inadequate attempt to adjust to the philosophy of John Locke the rude beginnings and tentative, unconscious efforts of the courts in the direction of a body of rules of evidence, hurt rather than helped matters'.²⁰

This is an unduly harsh judgement on the first serious attempt to provide a coherent and principled theory of evidence, which was not published in the author's lifetime and which was then interpreted more rigidly than he probably intended. Nevertheless, the view that Gilbert's theory was false and had exercised a baneful influence prevailed; similarly during the nineteenth century it was Bentham's conceptual scheme rather than Gilbert's which prevailed, not because of his attack on Gilbert (which was hidden in the little-known *Introductory View*), but because this was one part of Bentham's theory of evidence that was picked up by most later writers.

Bentham²¹

Bentham's main work on evidence was done in the period 1802–12, but his interest in the subject spanned the whole of his working life. His writings on evidence and procedure are vast: in addition to the main published works, *Traité des preuves judiciaires* (ed. Dumont), *An Introductory View of the Rationale of Evidence* (ed. James Mill), *Rationale of Judicial Evidence* (ed. J. S. Mill), and *Principles of Judicial Procedure* (ed. Richard Doane), there are several important other works in which the subject is discussed; the surviving unpublished manuscripts are almost as extensive as the corpus of published works, although many of them represent earlier versions of the latter.²²

Elie Halévy wrote: 'Of all Bentham's works *The Rationale of Judicial Evidence* . . . is the most voluminous and also without doubt the most important.'²³ In the John Stuart Mill edition it runs to nearly three thousand pages. It is not possible here to do justice to the richness, diversity and crankiness of its arguments, but the central thesis can be succinctly stated: the direct end of adjective law is rectitude of decision, that is the correct application of valid laws (presumed to be consonant with utility) to true facts. The collateral end is to minimize the pains of vexation, expense and delay. Conflicts between the direct and collateral ends are to be determined on the

basis of utility, but Bentham leaves no doubt that in this calculation he placed a high value on the pursuit of truth in adjudication. Judgements about the truth of allegations of fact are to be made by considering the relevant evidence – ‘Evidence is the basis of justice.’²⁴ Such judgements are based on estimates of probabilities, which estimates in turn are based on experience. The system of adjudication most conducive to promoting the ends of judicature is the Natural System as opposed to the Technical System. The Natural System takes as its prototype the wise father adjudicating in the bosom of the family, the disputants face to face, giving *viva voce* testimony and subject to cross-examination. No witness, including the parties themselves, and no relevant evidence is excluded, subject to preponderant vexation, expense or delay: ‘Be the dispute what it may, – see everything that is to be seen: hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it – the parties.’²⁵

Much of Bentham’s central thesis is negative in import. It consists of a sustained polemic on the unnecessary complication, absurdity and obscurity of the Technical System and on the sinister interests of the judiciary and the legal profession (‘Judge and Co.’) which sustain the system in England. Bentham also attacks all exclusionary rules of evidence (‘the non-exclusion principle’) and the very idea that the weighing of evidence is susceptible to regulation by formal rules, what I shall refer to hereafter as the anti-nomian thesis. There is, however, a positive side to the *Rationale*, for Bentham deals at length with such matters as the means of securing the forthcomingness of witnesses and of evidence, with securities for correctness and completeness of evidence, and with guidance by way of instructions to the judge about the weighing of evidence.

Bentham’s *Rationale* and assorted writings still represent the most ambitious and fully developed theory of evidence and proof in the history of legal thought. The nearest rival is Wigmore’s ‘science of judicial proof’, which underlies his great *Treatise* and is more fully, but still only partially, expounded in his neglected work *The Principles* [later *Science*] of *Judicial Proof* (hereafter referred to as Wigmore’s *Science*). Wigmore deals more comprehensively (and in a more up-to-date fashion) with some of the logical and psychological dimensions of proof, as well as dealing in far more detail with the history, content and underlying rationales of particular evidence doctrines. But Bentham’s theory is more extensive in several key respects: first, his theory of evidence and proof is more explicitly and fully integrated with a theory of adjudication, which in turn is part of a general constitutional theory and ultimately of a general theory of law. Wigmore did not develop a rounded theory of procedure or of adjudication comparable to Bentham’s. Secondly, Bentham’s prescriptions on evidence represent a direct and relatively straightforward application of the principle of utility. As such they are based on an explicit theory of value, albeit a highly controversial one. Most other theorists of evidence, including Wigmore, are less explicit and less coherent about the basis of their evaluations and recommendations. Thirdly, Bentham’s writings on evidence contain some of his most extensive

discussions of epistemology and psychology and, to a lesser extent, of logic. In the *Rationale* he expounds what might be characterized as a cognitivist, empirical epistemology, based on a correspondence theory of truth, which owes a great deal to Locke. Rather less clearly he advances a theory of induction, including a rather obscure account of reasoning about probabilities, which has been interpreted – probably correctly – as being nonmathematicist.²⁶ Except on the vexed issue of the nature of probabilistic reasoning, nearly all leading Anglo-American writers on evidence have adopted, more often than not *sub silentio*, epistemological and logical views which are similar to Bentham's. I shall return to this later.

It is also pertinent here to say something about Bentham's anti-nomian thesis. At first sight it seems surprising that the jurist who more than any other believed in the desirability and feasibility of a complete code of substantive laws, leaving no discretion to judges to make law, should also have been an extreme opponent of the view that judicial discretion in respect of deciding questions of fact should be limited by rules. Whether there is a fundamental inconsistency in Bentham's views on substantive and adjective law in this respect is a matter of controversy among specialists.²⁷ But there is no doubt about his opposition to rules of evidence:

To find infallible rules for evidence, rules which insure a just decision is, from the nature of things, absolutely impossible; but the human mind is too apt to establish rules which only increase the probabilities of a bad decision. All the service that an impartial investigator of the truth can perform in this respect is, to put the legislators and judges on their guard against such hasty rules.²⁸

Although in the *Rationale* he placed particular emphasis on the non-exclusion principle, Bentham was opposed to all rules of evidence: rules governing credibility, weight and quantum of evidence are all mischievous. The apparent extremism of the anti-nomian thesis is subject to two major caveats. First, Bentham concedes that in theory a time may come when judging the closeness of the connection between a principal fact and an alleged evidentiary fact might profitably be subjected to rules: 'To take the business out of the hands of instinct, to subject it to rules, is a task which, if it lies within the reach of human faculties, must at any rate be reserved, I think, for the improved powers of some maturer age.'²⁹ But he consistently maintains that such a task, even if it is conceivable, is not yet feasible.

A second concession is more significant: what Bentham is opposed to is 'unbending rules' addressed to the will of the judge; it is, however, the role of the legislator to provide 'instructions' addressed to the understanding – general guides which he even sometimes refers to as 'rules'.³⁰ This is significant, for several subsequent writers on evidence have questioned the desirability of having binding rules of evidence, as opposed to guiding principles. Some have even gone so far as to doubt whether rulings on points of evidence should ever have the force of precedent and whether such rulings should be subject to appeal. Even Wigmore, in debating the Model Code of Evidence, went so far as to suggest that its rules should be 'directory, not mandatory'³¹ to the judge, whose rulings should be subject to review only

in extreme instances. Viewed in this light Bentham's anti-nomian thesis has some distinguished allies.

Subsequent Anglo-American writers on evidence have been selective in their reception of the anti-nomian thesis. With relatively minor exceptions, they have rejected the idea that weight of evidence is susceptible to formal regulation. Perhaps the classic formulation is that of Wigmore: 'The principles of Proof, then, represent the natural processes of the mind in dealing with the evidential facts after they are admitted to the jury: while the rules of Admissibility represent the artificial legal rules peculiar to our Anglo-American jury system.'³²

In respect of rules of weight, Bentham's views have largely prevailed. There are two main exceptions. First, the law of evidence still lays down some formal minimum requirements concerning sufficiency of evidence: for example, the requirement of corroboration in cases of perjury, in relation to the evidence of accomplices, and to certain sexual offences.³³ Moreover the civil and criminal standards of proof could be interpreted as rules of quantum. Secondly, there has been a controversy as to whether questions of relevancy are ever questions of law. Thayer advanced the view that 'the law – furnishes no test of relevancy'.³⁴ Stephen, Best and Wigmore have variously argued that 'natural evidence' is restrained or modified by rules of positive law, with the result that the courts sometimes treat as irrelevant matters which are logically relevant (for example, because it is of insufficient probative force or in order to avoid a multiplicity of issues) and that some judicial decisions on relevance have value as precedents. The dispute is largely one of terminology, with few important practical consequences, for no clear formal lines are drawn and judges tend to exercise their discretion in this area along lines that are quite compatible with Bentham's thesis. There are few formal rules governing questions of weight or credibility of evidence and, in this respect, Bentham's victory is substantial, if not complete.

The position with regard to exclusionary rules is less simple. Many of Bentham's particular arguments have been accepted and some of his main targets, notably the exclusion of parties and others as competent witnesses, have virtually disappeared.

Nearly all the changes made since his day have been in the direction of abolishing or diminishing the importance of the exclusionary rules. This trend has generally gone further in England than the United States, especially in respect of civil evidence. However, Bentham's general principle of non-exclusion has not been accepted. Certain doctrines, such as legal professional privilege, parts of hearsay, the rule about previous convictions, and some other safeguards for the accused are still firmly entrenched, while others remain the subject of continuing controversy. The exclusionary rules have been eroded, but there is no immediate prospect of their complete abolition.³⁵

Nevertheless, Bentham's anti-nomian thesis has immense historical significance. Since his day protagonists of the common law rules of evidence have generally been on the defensive; the actual scope of the law of evidence, in the sense of those matters which are governed by mandatory rules, has steadily diminished and is today a good deal narrower than is sometimes supposed; and, haunting every expositor of the

rules and challenging those who favour a broader approach to law is the question: 'What would we study in respect of evidence and proof if there were no rules?'³⁶ But this is to run ahead of my theme. We must first look briefly at the main English treatise writers in the period 1800–50.

The early nineteenth-century treatises

The start of the nineteenth century saw the first of a succession of practical reference works on evidence for practitioners, which has continued until the present day. The first of these was *A Compendium of the Law of Evidence* by Thomas Peake (1771–1838), a barrister of Lincoln's Inn who later became a Serjeant at Law. Peake edited a series of reports of Nisi Prius cases starting in 1790, a period in which decisions on evidence became very prominent. Peake's *Reports* had an excellent reputation for clarity and accuracy. So did his *Compendium*, which was first published in 1801. It immediately became a standard work. It was intended as a book of practical reference, excluding 'every thing which was not practically useful', but emphasizing principle. The early chapters, including his statement of 'the general rules', followed Gilbert and Buller very closely, but he also included a great deal of new material on proof of private instruments, on parole testimony and on witnesses, thereby reflecting recent developments in the law, not least the establishment of a clear distinction between competence and credibility of witnesses. There is little that is original in Peake's ideas or approach, but the conciseness and accuracy of his exposition were praised, even by Bentham.³⁷ There were five English editions of Peake's *Compendium*, the last in 1822, by which time further changes in the law had rendered it obsolete.

The first edition of Peake's *Compendium* was quickly followed by an Irish work for practitioners, Leonard MacNally's *The Rules of Evidence on Pleas of the Crown*, published in Dublin in 1802. This was rather longer than Peake, although confined to criminal cases, but it does not seem to have been so successful. These two books can be seen as forerunners of a long line of compact works published in the nineteenth century, ranging from those of Harrison (1825), Saunders (1828) and Garde (1830), all of which appear to have made less impact than standard works that ran to many editions. The most successful of these were by Roscoe and Archbold. All of these books had limited, severely practical aims mainly as handy works of reference and they had little or no pretensions to influence the development of the law – although in the case of Archbold it probably did exert considerable influence, partly by its power of survival and by its convenience for and familiarity to practitioners and judges.³⁸

Sir W. D. Evans

In 1806 an English translation of R. Pothier's treatise³⁹ on the law of obligations was published in London, accompanied by a lengthy introduction and a commentary in the form of 'Notes, illustrative of the English Law on the subject'. The commentary was substantially longer than the translated text. The translator and commentator

was William David Evans, who was at the time a special pleader and conveyancer practising on the Northern Circuit.⁴⁰ Evans was an energetic, ambitious man who seems never quite to have fulfilled his potential as either lawyer or author. He served successively as a stipendiary magistrate in Manchester, as Vice-Chancellor of the County Palatine of Lancaster and finally as Recorder of Bombay, where he died at the age of fifty-four. He was a prolific editor and writer mainly, but not exclusively, on legal topics. He published several legal works, besides his edition of Pothier, and left several unfinished manuscripts at his death. A man of broad intellectual and legal interests, he was an enthusiastic proponent of the value of general jurisprudence and comparative law. In 1803 he had published a two-volume study of Lord Mansfield's decisions in civil cases,⁴¹ which he complained, in his introduction to Pothier, had 'remained three years almost entirely unnoticed'. This work reveals him as an ardent, if not entirely uncritical, disciple of Mansfield. He shared his hero's view of 'jurisprudence as a rational science, founded upon the universal principles of moral rectitude, but modified by habit and authority'.⁴² This notion provided both the inspiration and the basis for his treatment of Pothier.

Evans's Pothier has been widely recognized as a seminal influence on the development of English contract doctrine during the nineteenth century. His appendix on evidence, which ranges far beyond its application to contracts, was described by Wigmore as 'epoch-making'⁴³ on the ground that it was the first reasoned analysis of the rules and provided the theoretical foundation for the next phase of English writing about evidence. This probably exaggerates the importance of Evans's 'Notes'. Nevertheless it was a significant contribution, not least because it marked a much less rigid approach than Gilbert's.

Evans's study of Mansfield consisted largely of a descriptive survey of his more important decisions, with occasional comments. There was a strong emphasis on general principles. The section on evidence is one of the longest in the book. Similarly the appendix in Pothier's *Obligations* takes up nearly two hundred pages, almost twice the length of the relevant sections by Pothier. There is also a substantial appendix on the distinction between law and fact. Not surprisingly there is considerable affinity and some overlap between the earlier and later treatments of evidence. It is fair to say that Evans's general approach and his ideas on evidence are Mansfieldian.

Evans was an early exponent of general jurisprudence, which he seems to have equated with the *ius gentium*. He justifies his introduction of Pothier to the English lawyer on the ground that the study of foreign systems helps him to discern 'those great and fundamental principles which being deduced from natural reason are equally diffused over all mankind and are not subject to alteration by any change of time or place ...'.⁴⁴ Pothier's approach was based on similar ideas and it has been remarked that he drew 'an idealised picture of contract in eighteenth century France'.⁴⁵ Evans's commentary stresses the similarities of English and French principles, sometimes to a point which stretches credulity: it is surely misleading to suggest that the differences between the common law and civilian approaches to evidence and proof amounted to little more than some modifications of particular

jurisprudence, even though the theory of evidence in England was in a sufficiently undeveloped state to allow some latitude in its interpretation.

Evans's commentary follows Pothier's arrangement fairly closely. After a brief consideration of general matters, including the 'best evidence rule', he deals first with written evidence, in which the French rules regarding notarized documents are observed to be more systematic and more formal than their English equivalents. In treating verbal evidence Evans notes that the law of France goes much further than English law in not allowing oral testimony to be admitted either to vary or explain written contracts. Furthermore no verbal evidence could be given in respect of the making of a contract, the delivery of goods or the payment of debts where the matter involved exceeded 100 livres.⁴⁶ The French rules requiring two witnesses were much more extensive, as were their provisions for excluding witnesses on such grounds as infamy, partiality, enmity or relation to a party to a dispute. Finally, the French rules governing confessions, presumptions and oaths are shown to be generally more formal than their English counterparts.

It is strange that Evans should conclude that a very great proportion of the rules of evidence 'answers the description of Sir William Jones of being equally good law at Westminster as at Orleans'.⁴⁷ For not only does he document a number of very striking differences of substance, but he interprets the English rules in a much more liberal spirit than Gilbert and Peake, thereby sharpening the contrast between the rigidities of the French and the relative flexibility of the English approach. This is particularly clearly illustrated by his treatment of the best evidence rule and of rules governing competence and number of witnesses. Gilbert, as we have seen, made the 'best evidence rule' the unifying principle of his whole system. Evans quotes with approval an unnamed North Carolina case which both restricted its scope and emphasized its flexibility:

There is but one decided rule in relation to evidence, and that is, that the law requires the best evidence. But this rule is always relaxed upon two grounds, either from absolute necessity, or a necessity presumed from the common occurrences amongst mankind. The rule is not so stubborn but that it will bend to the necessities of mankind, and to circumstances not under their control. The rule is adopted only to obviate the fraud of mankind.⁴⁸

Evans accepts the 'best evidence rule' as a general starting-point, but unlike Gilbert he draws a sharp distinction between rules of admissibility, which are 'absolute and imperative' and questions of weight, on which he is not far from being an anti-nomian.⁴⁹ He is emphatic that in weighing contradictory testimony 'the mere consideration of number is held subordinate to that of the indications of individual veracity',⁵⁰ but he adds: '... although nothing can be more remote from the subject in discussion than the application of the strict rules of mathematical equality or proportion, a fair attention to the principles of those rules is often of considerable importance'.⁵¹ Evans openly criticizes some of the exclusionary rules of competency, arguing cogently that factors such as infamy or interest should go

to credit rather than competency; exclusion of a witness for mere suspicion, he suggests, 'is a very disproportionate sacrifice of a certain advantage to the avoidance of a contingent evil'.⁵²

It is difficult to estimate the significance of Evans's contribution. In respect of contract, his main achievement was to make Pothier's text available in English. But even Pothier could not conceal the extreme rigidity of the French rules of evidence. There is a tension between Evans's concern to emphasize the similarities of English and French principles and his plea for limiting rules of exclusion and for a flexible approach to weighing evidence. It is true that he sought to establish some notion of universal principles as a basis for evaluating English doctrine and that he urged that law in general and the rules of evidence in particular should be expounded in a systematic manner. But his treatment of evidence in his commentaries on Mansfield and Pothier is more discursive than analytical; it does not compare in intellectual rigour with the attempts of Gilbert or Bathurst or even Peake to expound a reasonably coherent statement of principles. While some of his language echoes the natural law tradition of Grotius and Puffendorf, there are passages that could be interpreted as being distinctly utilitarian.⁵³

In so far as one can extract a coherent general theory from Evans's work it is that a rational science of law should be based on universal moral principles reflected in the *ius gentium*, but modified in particular systems by tradition, authority and considerations of utility and convenience. Evans, unlike Gilbert and Peake, was prepared to criticize rather than merely rationalize existing doctrine, but his evaluation of the English rules of evidence was strikingly cautious; he advanced mild criticisms of some of the rules governing competency, confessions and comparison of hands, but he also tried to show that the great bulk of English rules, if interpreted as fairly flexible principles, were based on principles of natural reason. As he made clear in presenting his work on Mansfield to Lord Ellenborough, he was a moderate reformist, respectful of authority: 'It has been my aim . . . to do justice to that spirit of liberal improvement, which is equally remote from timid senility and wanton innovation.'⁵⁴

Wigmore suggests that Evans provided the first reasoned analysis of the rules of evidence and that his work was 'epoch-making'. For, when Phillipps and Starkie combined 'Evans' philosophy with Peake's strict reflections of the details of practice . . . [t]here was now indeed a system of Evidence, consciously and fully realized'.⁵⁵ This seems to exaggerate both Evans's originality and his influence. Much of his inspiration came from Mansfield. Several of his predecessors were familiar with Roman Law, if not with contemporary French doctrine. Gilbert and Bathurst in particular were concerned to develop a systematic and principled account of the law of evidence; indeed their attempts at systematization were later seen as premature and over-rigid. Evans's concern to promote a more flexible, less formal approach represents a cautious attempt to reverse this trend. But he was not conspicuously successful. Bentham seems to have ignored him and in any event would have considered his philosophy muddled and his suggestions for reform absurdly cautious. Subsequent writers such as Phillipps, Starkie and Archbold

drew from a wide range of sources. It is not clear how much, if at all, they were influenced by Evans's ideas (he complained that he was 'more often quoted than acknowledged'),⁵⁶ but their interpretation of the 'best evidence rule' and other rules was a good deal more rigid than his.

Phillipps

A Treatise on the Law of Evidence by Samuel March Phillipps of the Inner Temple, appears to have achieved instant success with practitioners. First published in 1814, new editions, each time 'with considerable additions', were published in 1815, 1817, 1820, 1822, 1824, 1829, 1838 and 1843. The stated purpose of the book was 'not so much to enquire minutely into particulars, as to take a general view of the system of the Law of Evidence; entering occasionally into details, for the purposes of illustration'.⁵⁷ But it was clearly used as a practitioners' handbook and it steadily increased in girth over the years, as new cases were fed into it, but old ones were generally not eliminated. In the first three editions Phillipps concentrated on attendance and competency of witnesses and on written evidence; with the fourth edition an entirely new second volume was added dealing with the nature of proofs required for various kinds of actions. Even as late as 1843 the principal general rules of evidence were dealt with in a single chapter occupying less than one twelfth of the whole work. As the author admitted, much of the second volume dealt with the rules of substantive law.⁵⁸ Until the publication of *Greenleaf on Evidence* in 1855, several editions of Phillipps's *Treatise* with American annotations, occupied a dominant place among practitioners' works in the United States.

Wigmore saw the works of Phillipps and Starkie as marking a transition from handbooks of practice to systematic treatises. Phillipps was not entirely insular, in that he cited Evans, Burnet's *Treatise of the Criminal Law of Scotland* and a few civilian writers. More important, he set out to expound the principles of his subject in a clear and systematic way. Rather than trying to provide a compendium of all authorities, he mainly used cases as examples to illustrate problems and points of practice as well as legal rules. For this purpose he drew on accounts of trials which did not necessarily have precedent value, in addition to reported authorities. However, there is little to suggest that he shared Evans's conceptions of universal jurisprudence and natural law. He consciously set out to expound and not to criticize the existing rules, and in giving explanations it is in terms of reasons stated in cases and older authors, the official view of the rationale for the rules rather than his own justifications for them. It is an attempt at systematic exposition which sticks closely to English law and practice, with utility to the practitioner as its primary aim. Its success may be attributable to this deliberate restraint as well as to the fact that he was accepted as accurate, perspicuous and well-organized.

Starkie

Thomas Starkie's *A Practical Treatise on the Law of Evidence* fits Wigmore's dictum more closely. Starkie was born in 1782. He was a Senior Wrangler at Cambridge and

he practised as a Special Pleader on the Northern Circuit for a number of years.⁵⁹ In addition to his treatise on evidence he published two other substantial treatises and a three-volume series of *Reports at Nisi Prius*. In 1823 he was elected to the Downing Chair at Cambridge, but teaching was not his forte: it is reported that he was not successful as a lecturer in Common Law and Equity at the Inner Temple and, according to one of his successors, Professor Kenny, he did not deliver any lectures at Cambridge during his last twenty years as Downing Professor.⁶⁰ However, he was more successful in the world of affairs as a barrister, law reformer and eventually as a County Court judge.

The Preface to Starkie's *Treatise on Evidence* (1824) is much closer to Evans than was Phillipps's. Law is regarded as a science, governed by universal principles, which are modified by the positive law of particular systems. Every rational system of judicial investigation shares with pure science 'the common aim . . . of discovery of truth'. Positive rules of evidence and procedure act as constraints on the operations of natural reason, often in a manner that is arbitrary and unjust. Starkie was not afraid to expound a general theory of evidence and to criticize current English law and practice in terms of universal principles. But, mindful of his audience, he was careful to state that he considered the English law of evidence by and large to be 'founded on just and liberal principles'⁶¹ and to emphasize that his work was intended to be of practical utility rather than to provide a critique of the remaining imperfections.

Starkie differs from Phillipps in several other respects. There is a long theoretical introduction, much more emphasis on the exclusionary rules of evidence and rather less on competency of witnesses. He exhibits a greater breadth of learning (although Phillipps was broadly read) and his style is more elegant, if more diffuse. Like Phillipps, his second volume contains a digest of proofs centred on the forms of action. Both deal with civil and criminal proceedings. Both became the standard works in the United States until superseded by local authors. Perhaps because of fiercer competition, perhaps because it was more obviously a work of scholarship as well as a practical treatise, Starkie did not achieve quite the same commercial success as Phillipps. He published four English editions at approximately ten-year intervals between 1824 and 1853, compared with Phillipps's nine editions in thirty years (1814–43).

Wills

In 1838 a Birmingham solicitor, William Wills, published *An Essay on the Principles of Circumstantial Evidence*, the product of his practical experience and of wide reading in his leisure hours. It is quite appropriately called an essay, for it does not fit into any of the standard categories of law books. It was not designed either as a reference work for practitioners nor as a student's textbook, nor as a polemic. Nor is it a work of high theory in the manner of Gulson or Michael and Adler. The author did set out to give a coherent account of 'the leading principles of circumstantial evidence'. He was not afraid to venture into philosophy, drawing extensively on Locke, Hampden,

Butler and various writers on logic and probability. But much of his text is occupied with illustrations taken from famous trials and his own experience as well as from the law reports. Indeed, like two later writers, Ram and Moore,⁶² he appears to have believed that the study of records of cases of controverted fact could provide the basis 'for consistent and immutable principles of reason and natural justice'.⁶³ He presents what he considers the principles governing circumstantial evidence as 'rules of induction', but it is not entirely clear whether he considered them to have the status of rules of law. He hardly mentions exclusionary rules of evidence and makes an eloquent argument against 'imperative formulae descriptive of the kind and amount of evidence requisite to constitute legal proof'.⁶⁴

A charitable interpretation of Wills's book is to treat it not as a work on the law of evidence, but rather as a reflective essay on the logical and practical aspects of handling circumstantial evidence – in Wigmore's terminology, a contribution to a science of proof. As such, if not particularly profound or original, it is eminently readable, and this may account for its subsequent popularity in the United States and India as well as in England. Later editions contained extensive treatments of scientific evidence and in time it became established as a popular practitioners' handbook, although it dealt hardly at all with legal doctrine.

Best

In 1844 William Mawdesley Best (1809–69), a barrister of Gray's Inn, published *A Treatise on Presumptions of Law and Fact*, a work primarily concerned with circumstantial proof in criminal cases. Five years later this was followed by a more general treatise on *The Principles of Evidence* (hereafter *Best on Evidence*), which soon became a classic. Best was a scholar as well as a practising lawyer, and his research goes beyond the English authorities to draw on philosophical writings, continental jurists, Romanists and others. It is a rounded and elegant work of scholarship which deservedly established itself as a standard advanced textbook and, in time, as an authority. Best's avowed aim was to examine the principles underlying the rules of evidence rather than to provide another practical treatise, but the work gained sufficient favour with the Bar that by the twelfth and last edition, published in 1922, it had expanded to include references to over three thousand cases.

Best managed to integrate theoretical and historical analysis with principled exposition in a way which has since been bettered only by Wigmore and which has not been repeated in England during the twentieth century. He drew freely on Butler, Heineccius, Hume, Locke, Paley and other theoretical writers, and the final chapter sets out elementary rules for conducting examination and cross-examination modelled closely on Quintilian. Best had made a careful study of Bentham's *Rationale*, and much of the organization and terminology of the theoretical parts followed Bentham quite closely. But he is also one of his most judicious critics. According to him Bentham was mistaken in his distrust of judge-made law and of the legal profession, and in his faith in codification and in publicity as a security against misdecision.⁶⁵ Bentham's principal error was to fail to take account of the peculiar

nature of judicial evidence, several characteristics of which give rise to the need for special rules; exclusionary rules and investitive rules, that is those ‘investing natural evidence with artificial weight’. Unlike the *paterfamilias*, the judge is concerned solely with *expletive* justice, that is, the enforcement of strict legal rights and duties, and to this end the discretion of tribunals in determining facts must be limited. The need for prompt and final decision requires rules regulating the burden of proof and presumptions. The evil consequences of possible conviction of the innocent also require special safeguards. The differences between historical and judicial enquiries lead to the need for special legal securities against misdecision. in addition to publicity, such as oaths, prescribed forms for pre-appointed evidence and the rejection of testimony of suspected persons, all of which were undervalued by Bentham. Best also defended the lawyer–client privilege and took a *via media* between the existing law and Bentham on rules governing competency.

Best’s most scathing criticism was reserved for Bentham’s moral thermometer, ‘a plan so extraordinary that it is but justice to give his own words’.⁶⁶ He adopts the criticisms made by Dumont and Bonnier; one of his later editors, J. M. Lely, omitted the passage devoted to this ‘fantastic suggestion’ on the grounds that the thermometer was ‘one of the few follies of a very wise man’.⁶⁷

Despite his attacks on some of Bentham’s central doctrines, Best did as much as anyone to keep his influence on thinking about evidence alive. He became the main conduit for a moderate version of Benthamism. The terminology and much of the organization of *Best on Evidence* are inspired by Bentham, as are some of his statements of principle and his criticisms of the exclusionary rules. Where Bentham’s conclusions are rejected, it is usually in his own terminology and on utilitarian grounds; some of his arguments were adopted by Best but in a more moderate tone. Thus it could be said that some of Bentham’s ideas lived on in a moderate form in a work which prospered for over seventy years and which, more than nearly all other treatises on evidence, seems to have satisfied simultaneously the needs of students, practitioners and scholars.

The later history of *Best on Evidence* is a good example of the influence of the market on the form of treatises and textbooks. The author’s original claim that this was not intended as a practical treatise was submerged in its success. The first edition was 540 pages long and cited under 600 cases. In 1876 Stephen pointed out that it had swollen to 908 pages and cited about 1,400 cases, providing some justification for the launching of a new students’ work.⁶⁸ By 1923 the reviewer in the *Harvard Law Review* could justly complain that it was being kept alive for a purpose for which it was not originally intended and that an English barrister might be better occupied in preparing an English edition to Wigmore’s *Treatise*, just as American reviewers had suggested that Taylor’s editors would have been better occupied in doing something similar.⁶⁹ In fact *Best on Evidence* remained in print for many years beyond this. Two of his editors, Sydney Phipson and Charles Chamberlayne, eventually produced leading treatises of their own.

Greenleaf

Simon Greenleaf (1783–1853) was one of the first of the great series of treatise writers associated with Harvard. He was a disciple of Joseph Story.⁷⁰ The first edition of *A Treatise on the Law of Evidence* was published in 1842. It was originally planned as a student text, but from the start the author ‘was naturally led to endeavour to render the work acceptable to the profession as well as useful to the student’.⁷¹ Up to that time the field had been dominated by the English works of Phillipps and Starkie, supplemented by notes on American cases. These had become increasingly inconvenient to use and less and less satisfactory as the rules of evidence in England and the various American jurisdictions diverged through both legislation and judicial activity. Up to that time the only indigenous American treatise had been a short work by Chief Justice Swift of Connecticut, published in 1810.⁷²

Greenleaf’s aim was ‘to state those doctrines and rules of the Law of Evidence which are common to all the United States’⁷³ without trying to note all local variations. In later editions, recent decisions in England and Ireland, as well as in the United States and Canada, were included. The first volume dealt with theoretical matters and general principles, but the second (and latterly subsequent volumes) dealt with details of the evidence requisite in certain particular actions and issues at common law, matters of great value to the practitioner, but belonging more to substantive law and procedure than to the law of evidence. Thus *Greenleaf on Evidence* was a hybrid: it dealt not with the law of any one jurisdiction, but rather with the principles of the Anglo–American law of evidence; it was designed to meet the needs of both students and practitioners, two rather different audiences, especially after the rise of teaching by the case method. It soon became established as the leading American practitioners’ treatise on the subject. The fact that it went through sixteen editions in less than sixty years is a measure both of its success and of the pace of change in this branch of the law during this period.

After Greenleaf’s death in 1853, his editors made little attempt to do more than keep it up to date through annotations, so that like many works it suffered a steady decline in quality and utility, until the young John Henry Wigmore took over as editor of the sixteenth edition. As we shall see, this led on directly to Wigmore’s own *Treatise*; but before that *Greenleaf on Evidence* made an impact in England in rather unusual circumstances.

Taylor

John Pitt Taylor’s *A Treatise on the Law of Evidence as Administered in England and Ireland* (first edition 1848), is an interesting case-study in publishing history. The author’s original intention was merely to edit Greenleaf’s American treatise for use in England and Ireland, but he found that English case and statute law had diverged too far to make mere annotations satisfactory. Accordingly he published the work in his own name, despite the fact that substantial portions of the original

text were Greenleaf's *ipsissima verba*.⁷⁴ This led Thayer to remark some years later: 'If Mr. Taylor . . . had indicated the real nature of his book, not merely in the ample acknowledgments found in his preface and elsewhere, but in the title of the book; if, for instance, he had called it "Taylor's Greenleaf", – less dissatisfaction with his course would have been felt on this side of the water.'⁷⁵ This doubt about Taylor's originality may have led to an underestimation of the real worth of his work.

Taylor, a barrister who in due course became a County Court judge, was a dedicated scholar with a deep interest in his subject. His work soon acquired the reputation for combining comprehensive coverage of the English authorities with Greenleaf's 'terse and luminous' writing. If anything, he was more of an intellectual than Greenleaf, and he was less impatient of philosophical and other non-legal literature than his American precursor. But *Taylor on Evidence* was conceived and executed as a work for practitioners. It lasted for over eighty years, for forty of them with Taylor himself as editor. For nearly fifty years it was regarded as the leading practitioners' treatise, replacing Starkie and Phillipps and in due course being overtaken by Phipson.

The editor of the ninth edition (1895), G. Pitt-Lewis QC, was quite bold in cutting and updating the work, but by the eleventh edition (1920), the editors rather pointedly claimed 'to have as far as possible, reverted to the very words used by the author in his final edition'.⁷⁶ Whether this was done because it was felt that to preserve the actual words of a dead author would maintain its status as an authority, or for some other reason, the later editions drew fire from academics. Zachariah Chafee suggested in the *Harvard Law Review* that English barristers might spend their time better than in 'warming over for the eleventh time the words of an American . . . long superseded in his own country'.⁷⁷ Eventually, an unusually long and acerbic review by Stallybrass in the *Law Quarterly Review* administered the *coup de grâce*. He contrasted 'the perfunctory editing of great books by busy practitioners who perhaps have not made any profound study of the subject' with Taylor's own deep interest in the history and the rationales behind the rules as well as in their practical application.⁷⁸ The demise of *Taylor on Evidence* marks the end of a period in England in which concern with the history and underlying theory of the subject was not regarded as incompatible with the production of works of practical utility to the practitioner.

Burrill and Appleton

Greenleaf's treatise was first published in 1842. During the next fifty years it dominated the field, its nearest rivals being American versions of standard English works. Best appeared with relatively sparse American annotations; Wills was plagiarized by one William Will; Phillipps and Starkie survived for a time; even Taylor, itself based on Greenleaf, eventually reached an international edition. Stephen's *Digest*

also seems to have been popular in some parts of the United States in the latter years of this period.

The two most interesting American works published on evidence in this period are by Alexander Burrill and John Appleton, both of whom were influenced by Bentham. Burrill, a New York practitioner, first published *A Treatise on the Nature, Principles and Rules of Circumstantial Evidence* in 1856. In some respects it is an American counterpart of Wills and Best, a learned, somewhat discursive essay on the theory and practical applications of circumstantial evidence. Burrill was more concerned with principle than with detail and treated cases more as illustrations than as authorities. The book was intended for the general public, as well as for professional use. It is an admirable work, elegantly written and drawing extensively on civilian writers and philosophers as well as on the standard English legal authorities. Burrill seems to have been as familiar with Beccaria and Hume as with Bentham. Wigmore, in his *Science of Judicial Proof*, referred to 'Burrill's masterly work',⁷⁹ but did not cite him in his *Treatise*. Although it reached a second edition in 1868, Burrill's work does not seem to have made much impact. Strangely, it is ignored by Thayer in his classic essay on presumptions, for Burrill's views were close to his own.

Burrill took Bentham as his starting-point, but did not accept him uncritically. By contrast, John Appleton, who in time became Chief Justice of Maine, was an ardent and effective disciple. Over a period of years Appleton published a series of articles forcefully criticizing particular exclusionary rules. He collected and revised some of these in a book, *The Rules of Evidence Stated and Discussed*, which was published in 1860. His stated aim was to examine 'the more important rules of law, as to admission and exclusion of evidence, and the differing modes adopted in its extraction', in the light of Bentham's reasoning and principles.⁸⁰ More than half of the book was devoted to competency of witnesses and of parties, the remaining chapters dealing with privileged communications, confessions, hearsay, examination and cross-examination of witnesses, and judicial oaths.

Appleton stuck closely, but judiciously, to the substance of Bentham's arguments, without falling into the trap of imitating either his style or his lack of diplomacy. His efforts at reform were remarkably successful. Between 1857 and 1860 a series of enactments in Maine swept away most of the rules of incompetency affecting parties, spouses, slaves and coloured persons, and greatly reduced the scope of exclusionary rules based on interest and religious belief. In 1864, largely due to the efforts of Appleton, Maine took the lead in enabling the accused to give evidence in criminal cases; most States soon followed suit and it became part of federal law in 1878.⁸¹ Some of the reform legislation in Maine had been anticipated in other states and by Denman's reforms in England, but it was not until 1898 that England reached the same point as most American jurisdictions in allowing the accused to testify. Appleton was not alone in promoting legislation on evidence between 1850 and 1880, but he was one of the most effective reformers and he provides one of the clearest examples of the influence of Bentham's ideas.

Stephen

From the mid-nineteenth century onwards American scholars began more and more to dominate the study of evidence. The trend was started by Greenleaf, consolidated by Thayer and Wigmore, and carried on by Chamberlayne, More, Morgan, Maguire, McCormick and others. There was, however, one significant English writer who deserves mention: Sir James Fitzjames Stephen (1829–94).

During his lifetime Fitzjames Stephen was known as a prolific writer upon many subjects, as a friend of Sir Henry Maine, as Carlyle's executor, as a champion of codification, and as a forceful, if somewhat simple-minded, judge. He is remembered today mainly for his works on criminal law, especially for his three-volume *History of the Criminal Law of England* (published in 1883), for his harsh views on punishment and as the man who narrowly failed to secure the codification of our criminal law.⁸²

Stephen was an ambivalent utilitarian, as befits one who was a student of Bentham and John Austin, a disciple of Mill on logic but not on liberty, and a friend of Maine and Carlyle. Of Bentham he wrote:

He was too keen and bitter a critic to recognise the substantial merits of the system which he attacked; and it is obvious to me that he had not that mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talent, approaching closely to genius.

During the last generation or more Bentham's influence has to some extent declined, partly because some of his books are like exploded shells, buried under the ruins which they have made, and partly because, under the influence of some of the most distinguished of living authors, great attention has been directed to legal history and in particular to the study of Roman Law.⁸³

This cautious attitude is reflected in Stephen's approach to the law of evidence. He was impatient of technicality, he welcomed the changes that had been brought about in respect of competency, and he agreed that the English law was unsystematic and confusing. But he did not share Bentham's dislike of judge-made law nor his opposition to all exclusionary rules and he was particularly critical of what he regarded as Bentham's failure to recognize the dangers of prejudicial evidence.⁸⁴ In Stephen's view the rules of evidence had an important role to play in excluding everything that is irrelevant and in requiring the production of the best evidence available. Bentham had praised courts martial as embodiments of the natural system of procedure; Stephen observed that absence of rules of evidence led them into pursuing many irrelevant and vexatious questions. The English law of evidence needed some amendment and considerable simplification, but on the whole 'it is full of sagacity and practical experience, and is capable of being thrown into a form at once plain, short and systematic'.⁸⁵

Stephen had written briefly, but perceptively, about the merits and demerits of the English law of evidence in his *General View of the Criminal Law*, first published in 1863.⁸⁶ His main work in this field began when he succeeded Sir Henry Maine as Legal Member of Council in India in 1869. This was the great period of the

drafting and enactment of the Indian codes. The Code of Civil Procedure had been passed in 1859, the Penal Code in 1860, and a Code of Criminal Procedure in 1861. Drafts for general laws on contract and evidence had been prepared by the time that Stephen arrived. In three years of intensive activity he was responsible for twelve Acts (including redrafting the Indian Contracts Act and revising the Criminal Procedure Code). He played a major part in the preparation of eight more.⁸⁷ He drafted the Indian Evidence Act almost entirely on his own and he prepared a lengthy introduction and commentary which was published shortly after its enactment in 1872.⁸⁸ This contains the fullest and clearest statement of his general theory of and approach to evidence, although he later modified his views on some important points in response to criticism.⁸⁹

An Evidence Bill had been prepared in 1868, but it was dropped after the first reading.⁹⁰ Stephen criticized it as being incomplete and not sufficiently elementary for those who had to administer it, for much of it presupposed a prior knowledge of the English law of evidence. He also agreed with those members of Council who felt that it went too far in relaxing the exclusionary rules of evidence. So he set about drafting an entirely new Bill, condensing material to be found in 1,508 pages of *Taylor* into 167 crisp sections. There were a few modifications and omissions, but it was designed as a virtually complete Code applicable to Indian conditions.⁹¹

The Indian Evidence Act 1872 has generally been regarded as a masterpiece of compression, although it is doubtful whether it quite satisfied Stephen's own standards of intelligibility and completeness. It is still in force in India and has served as a model for many other jurisdictions. A century after its enactment the authors of the leading commentary on the Act may have had some justification in complaining that it had stagnated with virtually no amendment,⁹² but by and large it is thought to have stood the test of time and translation to different environments remarkably well. The succinctness and clarity of the Act have not prevented elephantiasis: the 1971 edition of *Sarkar* fills 1,477 pages of small print and is, if anything, larger than the edition of *Taylor* that Stephen took as his starting-point.

Stephen's aim was to adapt and to codify the English Law of Evidence without making sweeping reforms. It was, he said, 'little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India'.⁹³ The debate on the codification of evidence was the occasion for the often quoted remark, made to Stephen: 'My Evidence Bill would be a very short one; it would consist of one rule, to this effect: All rules of evidence are hereby abolished'.⁹⁴ Stephen argued strenuously against this, insisting that the Rules of Evidence had an important negative role to play in excluding everything that is irrelevant and in requiring the production of the best available evidence.

Stephen's Indian experience converted him to codification, confirmed his belief in strong government and led him to be highly critical of the casual and unsystematic approach to law reform in England. Shortly after his return he was invited by

the Attorney-General, then Sir John Coleridge, to prepare an Evidence Bill for enactment at Westminster. The Bill, based on the Indian Act, was ready early in 1873, but Coleridge was unable to introduce the subject until the last day of the Parliamentary Session. Shortly afterwards he was elevated to the House of Lords, and the Bill was never even officially published. Stephen was later to remark: 'It would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture.'⁹⁵ He was disappointed by the failure of his Evidence Bill, but in the words of Radzinowicz, 'not discouraged, and in a truly Benthamite spirit embarked upon the business of codification as a private enterprise'.⁹⁶ Parliament was not interested in the law of evidence, and traditional common lawyers were strongly opposed to codification. The courts were in no position to simplify and systematize the Law, so the task must fall on 'private writers'.

Shortly after being appointed Professor of Common Law in the Inns of Court in 1875, Stephen set out to produce a book that would meet this need. The outcome was *A Digest of the Law of Evidence*, published in June 1876. In the introduction he stated his aims as follows:

My object . . . has been to separate the subject of evidence from other branches of the law with which it has commonly been mixed up; to reduce it into a compact systematic form, distributed according to the natural division of the subject matter; and to compress into precise definite rules, illustrated by examples, such cases and statutes as properly relate to the subject-matter so limited and arranged. I have attempted, in short, to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which will, I hope, be useful, not only to professional students, but to even one who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into question of fact, as well as on every branch of litigation.⁹⁷

Stephen's first objective was to make as clear a separation as possible of the Law of Evidence from other parts of Procedure and Practice and from substantive law.⁹⁸ His classification follows Bentham's division between substantive and adjective law and sharpens the distinction between evidence and other parts of adjective law, such as rules of procedure and rules of practice. Thus, Stephen sought to exclude a great deal of material that had been dealt with by other writers on evidence. First, he treated the question: 'What may be proved under particular issues?' (for example, what must or may be put in issue in respect of a charge of murder) as belonging to the subject of pleading rather than of evidence. A very considerable portion of the treatises of Starkie, Roscoe, Taylor, Greenleaf and others was taken up with such matters.

Secondly, he treated most 'presumptions' as belonging to different branches of the Substantive Law – 'and to be unintelligible, except in connection with them'.⁹⁹ This excluded from consideration such maxims as *ignorantia iuris haud excusat* and various presumptions as to rights of property. He did include, after some hesitation,

a number of presumptions and estoppels in his *Digest*, notably the presumption of innocence, of legitimacy, of death from seven years' absence, of lost grant and of regularity. Subsequently, Thayer, in a famous essay, was to challenge whether most of these were properly termed 'presumptions' and whether any of them belonged to the Law of Evidence.¹⁰⁰ Debate has continued over the perplexing questions about the classification and place of presumptions in the law, but almost all leading writers on evidence have followed Stephen in treating at least some of them as belonging to the Law of Evidence.

Thirdly, Stephen argued that rules concerning the attendance of witnesses, the taking of depositions, interrogatories and statutory provisions making particular documents evidence of certain facts all belonged to the subject of Procedure rather than that of Evidence. However, some later editions included an Appendix, borrowed from Wills, containing a Table of Statutes governing the mode of proof of public documents, because of its utility to practitioners. This indicates that what had started out as a students' work was being widely used as a handy practical manual.

Stephen acknowledged the difficulty of drawing a sharp boundary between the Law of Evidence and other branches of law. But he was largely successful in substantially reducing the scope of the subject and most academic writers subsequently followed his lead. This not only enabled him to make a succinct statement of the law of evidence, but also to give it a coherent theoretical base.

Stephen's second objective was to ground his exposition on a single unifying principle, the doctrine of relevancy. Here he was less successful and, ironically, was later accused of unjustifiably extending the scope of the Law of Evidence.¹⁰¹ The attempt is of great historical significance. It marked a break with the legacy of Gilbert and the starting-point of most modern treatments of the subject.

Stephen boldly tried to restore order to the study of evidence, substituting a new unifying principle. Earlier writers, he suggested, had failed adequately to distinguish between 'evidence' in the sense of testimony and 'evidence' as facts relevant to the facts in issue:

The great bulk of the Law of Evidence consists of negative rules declaring what, as the expression runs, is not evidence.

The doctrine that all the facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to a system, until it occurred to me to ask the question, What is this evidence which you tell me hearsay is not? The expression 'hearsay is not evidence' seemed to assume that I knew by the light of nature what evidence was, but I perceived at last that was just what I did not know. I found that I was in the position of a person who, having never seen a cat, is instructed about them in this fashion: 'Lions are not

cats, nor are tigers nor leopards, though you might be inclined to think they were.' Show me a cat to begin with, and I at once understand both what is meant by saying that a lion is not a cat, and why it is possible to call him one. Tell me what evidence is, and I shall be able to understand why you say that this and that class of facts are not evidence. The question 'What is evidence?' gradually disclosed the ambiguity of the word. To describe a matter of fact as 'evidence' in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What then does the phrase mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference – in words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that the judicial evidence is only one case of the general problem of Science – namely, inferring the unknown from the known. As far as the logical theory of the matter is concerned, this is an ultimate answer.¹⁰²

Stephen's *Digest* was immensely popular. The first edition was reprinted three times in 1876 and 1877, and new editions followed fairly regularly during the next decade. It increased in weight and girth conspicuously less than most books on evidence as it passed through a total of twelve English editions, the last in 1948. It was also well known in the United States and in other parts of the Commonwealth and Empire, where its closeness to the Indian Evidence Act enhanced its popularity and its influence. Clearly it filled a felt need for a compact and systematic treatment of the subject.

The *Digest* was more than just a successful effort by a respected author to fill a gap in the literature. Rather it was a bold attempt to base a systematic treatment of the law of evidence on a single principle. For over a hundred years the ghost of Gilbert's formulation of the 'best evidence rule' had haunted the exposition of the law. Peake, Phillipps, Starkie, Greenleaf, Taylor and Best had all stated it as the main underlying principle of the law of evidence, but had then hedged it round with so many qualifications and exceptions that it served almost no useful purpose. Indeed, it had created much confusion. As Thayer argued in his brilliant essay on the rule, Burke interpreted it as leaving no rules of evidence at all; some nineteenth-century writers converted it from a rule of permission, allowing inferior evidence when other evidence was not available, to a rule of exclusion forbidding substitutionary evidence; they thereby conflated several different specific rules with different origins and different rationales.¹⁰³ Thus Gilbert's original unifying principle of the law of evidence had become at best unhelpful, at worst misleading. Stephen offered a fresh start, substituting Mill for Locke as the philosophical starting point, and the doctrine of relevancy for the 'best evidence rule' as the unifying principle.¹⁰⁴ Stephen's unifying principle was also rejected; but whereas Gilbert's attempt may have caused some harm,¹⁰⁵ Stephen stimulated some of his critics to make some important clarifications of the basic concepts of the law of evidence¹⁰⁶ and some of

his immediate successors, notably Thayer, Wigmore and Chamberlayne, to take up the challenge of reducing the law of evidence to order on sound principles. It was a fruitful failure.

Thayer¹⁰⁷

In 1874 James Bradley Thayer (1831–1902) was appointed to the Royall Professorship of Law at Harvard and a new era of Evidence scholarship began.¹⁰⁸ Before entering academic life Thayer had divided his energies between legal practice, literary reviewing and some legal editing. During his twenty-eight years at Harvard, Thayer made contributions of profound importance to both Evidence and Constitutional Law, but in one sense he never really fulfilled his potential. Soon after he joined Harvard Thayer resolved to write a major practical treatise on evidence, but the more he delved into the subject the more he was impressed by the general confusion surrounding both the case law and the literature in the field:

The chief defects in this body of law, as it now stands, are [the] motley and indiscriminated character of its contents . . . ; the ambiguity of its terminology; the multiplicity and rigor of its rules and exceptions to rules; the difficulty of grasping these and perceiving their true place and relation in the system, and of determining, in the decision of new questions, whether to give scope and extension to the rational principles that lie at the bottom of all modern theories of evidence, or to those checks and qualifications of these principles which have grown out of the machinery through which our system is applied, namely, the jury.¹⁰⁹

Thayer admired Fitzjames Stephen for his brave attempt to cut through the jungle of detail and confusion to establish a systematic foundation for the subject on the basis of principle. But Stephen's chosen principle, his doctrine of relevancy, failed to perform the task. It was, as Pollock called it, 'a splendid mistake'.¹¹⁰ Thayer told his pupils that 'a more excellent way' was still needed.¹¹¹ As a preliminary to writing a practical treatise he embarked on detailed historical research which took him further and further away from his original project. The result was one of the classic works of legal history, but no systematic treatise.

Some of Thayer's main theses are familiar: he linked the origin and continuance of the exclusionary rules of evidence to the survival of the jury, a view adopted by Wigmore, but challenged by Edmund Morgan.¹¹² More firmly and clearly than his predecessors, he emphasized the narrowness of the scope of the common law of evidence:¹¹³ it was a mistake to treat presumptions and the burden of proof as rules of evidence; the most common grounds for exclusion of evidence were materiality – a matter of substantive law – and relevance, which was a matter of logic, not law. Stephen's basic error was to treat the logical presuppositions of a rational system of evidence as formal rules of evidence. Bentham's *Rationale* was not a law book.¹¹⁴

Thayer's main approach was not anti-nomian but he did favour an extension of judicial discretion and a radical simplification of the law of evidence. Rather he was concerned to clarify, both historically and analytically, the differences between rules

of evidence, on the one hand, and rules of substantive law and precepts of logic on the other. In this view the core of the law of evidence was an essentially negative ‘set of regulative and excluding precepts’ based on policy,¹¹⁵ which set certain artificial constraints on what witnesses and what classes of probative facts may be presented to a jury and how certain types of fact may or must be proved. For Thayer the modern system of proof is essentially rational, but ‘the law has no mandamus to the logical faculty’.¹¹⁶ Some legitimate constraints are placed on the operation of natural reason by substantive law, by the exigencies of litigation, by extrinsic policy and, above all, by the institution of the jury. But the scope and functions of the law of evidence are quite limited and could be reduced to a simple system, based on two principles: ‘(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy of law excludes it.’¹¹⁷

Thayer is mainly remembered today for his *Preliminary Treatise*, but his influence may have been at least as great, if not greater, through his teaching. His academic career coincided with the era of the blossoming of the Harvard Law School as the home both of the Langdellian system of legal education and of the inspired and varied scholarship of Holmes, Langdell, Ames, Gray, Williston and Thayer himself. Three of the leading Evidence scholars of the next generation – Charles Chamberlayne, John McKelvey and John Henry Wigmore – were his pupils. Several more, including Edmund Morgan, John Maguire and Zechariah Chafee, narrowly missed being taught by him, but lived in the shadow of his influence, modified perhaps by the more down-to-earth approach of the great John Chipman Gray, who reluctantly took over teaching Evidence after Thayer’s death. Perhaps the main medium of Thayer’s continuing influence was his *Select Cases on Evidence at the Common Law*. This was first published in 1892. It was revised by Thayer in 1900, shortly before his death, and in this form it became the leading casebook on Evidence in American law schools for a quarter of a century. In 1925 John Maguire produced a revised edition, by arrangement with the Thayer family.¹¹⁸ Then in 1934 it was transformed, under the direction of Edmund Morgan, into what was in most respects a new book, but with an acknowledged and legitimated parentage. Morgan and Maguire’s *Cases on Evidence* lasted through successive editions until 1965, when it was succeeded by the Foundation Press casebook, *Cases and Materials on Evidence*, the latest edition of which appeared in the names of Maguire, Weinstein, Chadbourn and Mansfield in 1973.¹¹⁹ This explicitly claims to trace its lineage directly back to Thayer’s *Cases*. It is still one of the leading casebooks used in American law schools. Thus almost since the beginning of the American casebook as a major form of student literature, Thayer’s *Select Cases on Evidence at Common Law*, and its direct descendants, have continuously occupied an important, sometimes a commanding, position in American legal education. Although the scope of the book and the range of materials used have both expanded, perhaps even in ways that Thayer might not have approved, the main focus is still consciously on the rules of evidence, rather than on all aspects of proof – the bulk of the materials consists of appellate cases and

the leading contemporary American ‘codes’ – the Federal Rules of Evidence, the California Evidence Code, and the Uniform Rules of Evidence.

Thayer never got round to expounding the simple system of evidence doctrine that he advocated. Whether he was too fastidious or otherwise temperamentally unsuited to the task, or whether it was a contingent fact that he died before completing it, is uncertain.¹²⁰ It was left to three of his pupils, Wigmore, Chamberlayne and McKelvey, to continue the search for ‘a more excellent way’. He inspired each of them to do this in strikingly different fashions.

McKelvey produced a successful and provocative black letter text which was widely used as a companion to Thayer’s casebook, but which made no visible impact on the development of the law of evidence nor on legal scholarship.¹²¹ Wigmore and Chamberlayne deserve more detailed treatment.

Wigmore

Few, if any, legal scholars have been praised so often or in such extravagant terms as John Henry Wigmore (1863–1943), for many years Dean of Northwestern Law School and author of *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*.¹²² Of the first edition John Henry Beale wrote: ‘It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written.’¹²³ Wigmore’s most persistent critic, Edmund Morgan, wrote of the third edition: ‘Not only is this the best, by far the best, treatise on the Law of Evidence, it is also the best work ever produced on any comparable division of Anglo-American law.’¹²⁴ Other commentators have been even more lavish in their praise.

It is not possible to do justice here to Wigmore’s many achievements. He was an essentially simple-minded man who combined exceptional industry with a clear mind, broad interests and a methodical approach.¹²⁵ His unrivalled mastery of his field was attributable in large part to his simplicity of vision: the world is full of a marvellous diversity of things, but with application and a systematic approach they can be reduced to order; supremely self-confident and untroubled by doubt, he reduced more material to order than any other legal scholar.

Wigmore began his career as an Evidence scholar as the editor of the first volume of the sixteenth, and last, edition of *Greenleaf on Evidence*. This was so well received that he was immediately commissioned to produce an entirely new treatise to replace Greenleaf. This, in turn, was so successful that not only is it still the leading Anglo-American treatise on evidence, but no one has yet dared to try to produce a serious rival.

In the preface to the first edition, Wigmore stated the aims of the work:

First, to expound the Anglo-American Law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules; and, thirdly, to furnish all the

materials for ascertaining the present state of the law in the half a hundred independent American jurisdictions.¹²⁶

From the outset Wigmore was concerned to go beyond the bare exposition of evidence doctrine: he explored in detail and depth the history and rationales of all the main rules and he included a considerable amount of material on forensic psychology and forensic science. At the same time, following Thayer, he generally excluded matter that he felt belonged to substantive law or the law of procedure.¹²⁷

Wigmore's *Treatise* succeeded in being both a monumental work of scholarship and a highly successful practitioners' treatise. However, the constraints of the treatise form inhibited him from dealing as systematically or as fully as he would have liked with what he termed 'the science of proof'. Accordingly, he set out to remedy this in a separate work, *The Principles [later Science] of Judicial Proof as Founded on Logic, Psychology and General Experience*.¹²⁸ At the start of *The Science* Wigmore stated with typical forthrightness:

The study of the principles of Evidence, for a lawyer, falls into two distinct parts. One is Proof in the general sense, – the part concerned with the ratiocinative process of contentious persuasion, – mind to mind, counsel to judge or juror, each partisan seeking to move the mind of the tribunal. The other part is Admissibility, – the procedural rules devised by the law, and based on litigious experience and tradition, to guard the tribunal (particularly the jury) against erroneous persuasion. Hitherto, the latter has loomed largest in our formal studies, – has, in fact, monopolized them; while the former, virtually ignored, has been left to the chances of later acquisition, casual and empiric, in the course of practice.¹²⁹

Wigmore proceeded to argue that 'the science of proof' is both anterior to and more important than the trial rules of evidence. Moreover, it had been neglected in legal education and legal scholarship and, since the rules of evidence were destined to decline in importance, it was vital to try to develop a science of proof: 'All the artificial rules of Admissibility might be abolished; yet the principles of Proof would remain, so long as trials remain as a rational attempt to seek the truth in legal controversies'.¹³⁰

Both commercially and in terms of intellectual influence Wigmore's *Science* was almost as much a failure as his *Treatise* was a success. It never caught on, and systematic Evidence scholarship continued to concentrate largely on the rules; indeed, there was for most of the twentieth century proportionately less interest in the historical and philosophical aspects of evidence than there was in the nineteenth. This is illustrated by the fact that Thayer remains our leading historian of Evidence, and Bentham and Wigmore its most important theorists.

What is significant, in the present context, is that the leading Evidence scholar of the twentieth century based his whole approach to his subject on a rounded and relatively well-articulated theory of evidence and proof, which went beyond concentration on the rules of evidence to encompass, in an integrated fashion, both

legal doctrine and the logical, psychological and scientific aspects of proof. It is misleading to present the *Treatise* as dealing with rules and the *Science* as dealing with the 'non-legal' aspects: both are based on a shared conceptual framework and the same underlying theory, which received its fullest exposition in a largely forgotten work. Wigmore claimed that his was the first attempt in English since Bentham to deal with the principles of proof 'as a whole and as a system'.¹³¹ This was true when he wrote it and it is still true today. There has been valuable theoretical work by Gulson, Michael and Adler, Jonathan Cohen and others, but none of these has set out to produce comprehensive theories. Thus Bentham and Wigmore are still our two leading theorists of evidence.¹³² In the next section I shall suggest that, despite important differences between them, they, and nearly all Anglo-American writers on evidence, belong to a single intellectual tradition. However, before doing so, it is illuminating to consider briefly two of Wigmore's forgotten contemporaries, Charles F. Chamberlayne and Charles C. Moore.

Chamberlayne

Charles Frederick Chamberlayne was born in Cambridge, Massachusetts in 1855 and died in 1913.¹³³ He went to Harvard College and Harvard Law School from which he graduated *cum laude* in 1881. As a student he fell under the spell of James Bradley Thayer, and for the rest of his life Evidence was his main interest. From 1884 to 1890 he was a trial judge, but for most of his career he divided his time between practice in New York and Boston and writing about Evidence. Soon after he graduated he was recommended by Thayer to be the American editor of Best's *Principles of the Law of Evidence* and between 1883 and 1908 he was responsible for American notes for three editions of that work, which was commended by Thayer 'as the most authoritative and reliable treatise on the subject of evidence in the English language'.¹³⁴ In 1897 he produced the American notes to the three-volume edition of *Taylor on Evidence*, which was at the time still the leading practitioners' treatise in England. Chamberlayne's notes were succinct, precise and to the point and he soon established an excellent reputation among both practitioners and academics. His last years were devoted to writing his *magnum opus*, *A Treatise on the Modern Law of Evidence* in five volumes, three of which were published posthumously.¹³⁵

It is interesting to consider Chamberlayne's work in the context of his own interpretation of the immediate past history of the development of evidence in the United States.¹³⁶ He accepted, with only minor modifications, Thayer's interpretation of the historical development of the law of evidence and of the defects to which it had given rise.¹³⁷ In Chamberlayne's view the feud, trial by combat, ordeals and the duel were not just primitive methods awaiting the development of a superior, more rational technology for ascertaining the truth. They also represented the expression of a primitive, individualistic ethos. 'The natural man understands fighting. He loves its self-assertiveness, its excitement, its triumphs . . . Naturally, all that this individualistic conception of the proper purposes of litigation has ever demanded of society is that it should stake out and maintain the lists, enforce the rules, and

make the victory effective to the victor.¹³⁸ The adversary process and the technical rules of evidence represented a non-violent extension of the sporting view of litigation based on the same ethos. 'The American elevation of the jury at the expense of the court' was a legacy inherited from England, where it was 'a direct result of the conscious rebellion of the Democracy of England against the power of the Crown as represented by the royal judges'.¹³⁹

The law of evidence and the administration of justice had not kept pace with social change. 'Happily, the battles of Democracy have been won; – completely and forever.' The domination of Individualism is being replaced, if not by Socialism, at least by 'an insistence that individualistic action shall be directed to socially beneficial ends'.¹⁴⁰ It is generally recognized that the administration of justice in modern democratic society requires the ascertainment of truth as an essential means of implementing the law. But the surviving structure of the adversary process, the jury system and rules of evidence led to a pernicious formalism for which society pays a heavy price in terms of injustice in individual cases, loss of popular respect for law, an impairment of the instinct for justice, and unnecessary expense and delay. There is furthermore a loss of intelligibility: 'A complex civilisation can scarcely avoid an intricate system of substantive law. But it need have no complicated system of procedure.'¹⁴¹

Thayer had eloquently summarized the failings of the law of evidence. In Chamberlayne's view the situation had deteriorated in the previous twenty-five years:

The multiplicity of connotations for a single term has increased; the admixture of substantive law has grown more pronounced; the attenuated lines of hair-splitting decisions have become yearly more numerous; the percentage of reversal to trial has crept steadily higher; the length of time required for final adjudication against an alert opponent with adequate financial resources has extended; the average expense of litigation has increased. In fact, the administration of justice, especially of criminal justice, is, in many parts of the country, obviously breaking down; the courts have necessarily lost much in popular respect. Indeed, they are the object of open, grave and continued political attack. And the end is not yet reached.¹⁴²

Given this diagnosis of the situation, Chamberlayne considered that there was a crying need for a more rational and more flexible system of administration of justice.

Stephen's *Digest* represented the first modern attempt to produce a radical simplification suited to modern conditions. Its instant popularity with the legal profession on both sides of the Atlantic showed that lawyers appreciated the need for change, but his doctrine of relevancy had been shown to be inadequate for the purpose.¹⁴³ Thayer had urged his pupils to seek 'a more excellent way' and had himself set out to confront the challenge.¹⁴⁴ But he had not completed his work. His *Preliminary Treatise* was an historical masterpiece, but it was only preliminary to the constructive task of placing the modern law of evidence on a scientific and flexible basis. If he had lived, Thayer might perhaps have done the job. But, Chamberlayne suggests, he was too much in love with history. The historical method is 'instructive rather than constructive'.¹⁴⁵ So it was left to his pupils to complete the task.

Unfortunately, Thayer's most talented pupil, Wigmore, had followed his teacher too closely. He, too, had adopted the historical method: 'indeed it is obvious but well-merited praise to say of Dean Wigmore's work that he has written very much such a treatise as Professor Thayer has led us reasonably to believe he might have written had he lived to finish his work in this respect'.¹⁴⁶ But the historical method is not suited to producing fundamental change; knowledge alone does not constitute reform; and an emphasis on the past and on precedents as authorities almost inevitably has a conservative tendency. Accordingly the search for 'a more excellent way' must continue.

Chamberlayne recommended the adoption of a quite different approach, based on what he termed 'the principle of administration'. He succinctly summarized the main ideas underlying his general approach as follows:

That the rules of Evidence are canons of judicial administration and not properly within the real scope of the doctrine of *stare decisis*; that the social objects of litigation outweigh in importance the personal; that Society has a transcendent interest in the ascertainment of truth and should remove all barriers across the path of its tribunals in reaching it; that the interests of justice should be intrusted to the Court rather than to the jury; – these are the fundamental propositions which I venture to commend to the favorable attention of the profession.¹⁴⁷

Chamberlayne explicitly, though discreetly, attributes 'the principle of administration' to Bentham.¹⁴⁸ Like Bentham he draws a sharp distinction between substantive and adjective law; the former must inevitably be governed by complex and detailed rules, the latter should be confined by very few formal regulations. The end of adjective law is to implement rights and duties under substantive law. The main test is whether it promotes the discovery of truth and by this test there should be no strict rules of admissibility. Generally speaking, unreliable evidence is better than no evidence. Chamberlayne's notion of 'administration', the granting of a wide discretion and ultimate responsibility to the judge to control the trial by reason rather than regulation, is strongly reminiscent of Bentham's 'doctrine of the single judge'.¹⁴⁹ His attack on the abuse of technicalities and on the sporting conception of the trial is little more than a restatement of Bentham's own attack on the 'fox hunter's argument'.¹⁵⁰ Chamberlayne's primary concerns were similarly to minimize expense and delay, and to secure the conviction of the guilty as well as the acquittal of the innocent.¹⁵¹ Above all his general strategy was anti-nomian: 'In connection with the law of evidence, the nerve of the octopus can readily be cut. It is the theory that judicial administration must be regulated by rigid rules.'¹⁵²

Chamberlayne summarized his constructive thesis as follows:

- 1 The social objects of litigation are vastly more important than the personal.
- 2 The transcendently important end which the community seeks to accomplish by litigation is not that the dispute between A and B should be settled by the use of reason and without violence; but that truth should be discovered and justice done as accurately and speedily as possible.

- 3 While old terminology is best retained, the connotation of terms should so far as practicable, be restricted to a single meaning.
- 4 Substantive law, including the determinate probative force of any given inference of fact, should be eliminated from the field of evidence.
- 5 The parole evidence rule and presumptions of law should not be treated as part of the law of evidence.
- 6 Any rule which excludes probative or constituent facts actually necessary to proof of the proponent's case is scientifically wrong.
- 7 Any privilege accorded a witness which prevents the ascertainment of truth is scientifically wrong.
- 8 The presiding judge should be strengthened in the exercise of the administrative function, and not subordinated to the prestige of the jury.¹⁵³

Chamberlayne's *A Treatise on the Modern Law of Evidence*, published in five volumes between 1911 and 1916, was the main vehicle for the development of his ideas. This was a work on the grand scale, comparable in size and heroic conception to Wigmore's *Treatise*. Unfortunately several factors conspired to diminish its impact. First, Wigmore's *Treatise* had been published several years earlier and had already begun to dominate the field. It required both courage and commitment to set out to produce a rival to that great work. Chamberlayne was an able, dedicated and learned man, but it hardly belittles him to say that he was not in the same class as Wigmore.

Secondly, the author died before the completion of the last three volumes. They seem to have been edited rather hastily with only the short-term needs of practitioners in mind. Remarkably, the publishers did not even mention the author's demise.¹⁵⁴ Possibly because of this shoddy treatment of the work after his death, there were relatively few reviews, and some of them were sharply critical of the publisher's and editors' behaviour.¹⁵⁵

Apart from his controversial political views, there is another reason why Chamberlayne made no lasting impact. His basic concern was to advance an argument for far-reaching changes in the law of evidence and the prevailing approach to it. But the literary form which was chosen as the vehicle for this was an encyclopaedic treatise. In the Preface he was at pains to stress that he had two aims in mind: first, to provide a severely practical work of reference for the busy practitioner, 'without any considerable indulgence in the delightful work of tracing historical developments or establishing true perspectives'¹⁵⁶ (a dig at Thayer and Wigmore). Secondly, 'that the building should present so much of precision in design and symmetry of arrangement as might supplement, and in a sense, increase its utilitarian advantages'.¹⁵⁷ Like Stephen, his aim was to simplify the law, by placing it on a rational basis, but without the confusions in Stephen's doctrine of relevance. Unlike other writers on evidence, he would approach the subject from the standpoint of administration rather than that of procedure, treating the rules merely as illustrations of 'the few simple and primary canons of judicial administration'.¹⁵⁸ These somewhat opaque phrases concealed the fact that this work claimed at once to be a practical work of

reference and a sustained argument for change in the substance and the spirit of the American approach to evidence. Chamberlayne was justified in emphasizing the differences between his and Wigmore's treatises, but he failed to resolve the tension between his concern to provide practical detailed information about existing doctrine and his desire to develop a coherent theory and polemic *de lege ferenda*. His argument for change led him to step beyond the latitude for interpretation available to the expositor into statements that could only fairly be interpreted as straightforward recommendations for change or as merely wishful thinking about what the law might be. This is particularly the case in respect of his treatment of the role of precedent in dealing with evidence. Thayer had argued that it was still open to treatise writers and the courts to impose order and system on the tangled jungle of case law without recourse to the legislature.¹⁵⁹ He had suggested that one cause of the trouble had been that some specific rulings at Nisi Prius had been wrongly treated as binding although they had 'no general element or principle which should make it a precedent'; other cases which should have been regarded merely as illustrations of a general principle had been treated as binding authorities on narrow technical points. Chamberlayne went much further in that he argued forcefully that it was 'unscientific' to treat rules of evidence as being subject to *stare decisis*. Thayer had suggested that the case law could be reinterpreted and expanded to yield a coherent body of principles; he was attracted by Stephen's model of restating the law, but rejected crucial aspects of his formulation. Chamberlayne was much closer to Bentham in advocating almost complete judicial discretion unregulated by formal rules of evidence. Unfortunately this reflected neither American practice nor professional opinion and severely undermined the value of a book that was presented and packaged as a practical work of reference in five substantial volumes. Chamberlayne's model was closer to Bentham's *Rationale* than to Wigmore's *Treatise* and it deserves attention as a work of theory.

Chamberlayne's *Treatise* was mainly discredited by being ignored. Ezra Ripley Thayer (his teacher's son), while welcoming Chamberlayne's attack on formalism, suggested that the book was 'marred by a faulty terminology and a tantalising diffuseness'.¹⁶⁰ More significantly there is not a single reference to it listed in the later editions of Wigmore, and it was almost completely ignored by other writers. This is unfortunate, for even today Chamberlayne's *magnum opus* is a rich source of arguments and ideas as well as of information and references. It may not be quite the 'masterpiece' that Harry Shulman of Yale, an early realist, proclaimed it to be,¹⁶¹ but it deserved a better fate. Chamberlayne's fault was not so much that he followed the advice, 'When preaching radical ideas, wear a suit', but rather that he forgot the corollary, 'and don't shout'.

Moore on Facts

One of the most remarkable publications of the first decade of this century was *A Treatise on Facts, Or Weight and Value of Evidence*, by Charles C. Moore, published in two volumes in 1908.¹⁶² The author was a New York practitioner, who had

joined Wigmore in attacking Muensterberg's claims for forensic psychology.¹⁶³ His treatise was a labour of love, the fruit of years of combing the law reports and other literature for material which no orthodox index or system of classification would reveal. His aim was to make available reported discussions by judges and others of the weight and value of evidence and the credibility of witnesses. The first volume contained chapters on such topics as 'Sound and hearing', 'Light and sight', 'Speed', 'The weather', 'Course and bearing of vehicles', as well as on more conventional topics such as 'Degree of proof', and 'Presumptions, inferences and circumstantial evidence'. The second volume could be seen as a compendium of lawyers' psychology as it collects together in one place a mass of judicial statements on observation, memory, bias, confessions, and other topics of witness psychology. The bulk of the work is taken up with material from the law reports. But there are also extensive quotations from the Bible, literature, philosophy, poetry and any other source that the author could lay his hands on. At first sight the book looks like an elephantine version of Wills on *Circumstantial Evidence* or Ram's *Treatise on Facts*.¹⁶⁴ But it is less analytical than Wills and more scholarly and discriminating than Ram; it is the product of considerably more effort than either.

Moore's *Treatise* represented a lifetime's work based on a category mistake. Whereas Chamberlayne had attacked the idea that *stare decisis* applied to any aspects of evidence, Moore gave the impression that the law reports could provide authoritative guidance on the weight and value of particular kinds of evidence as well as on questions of admissibility. His conception of the enterprise was rather confused and invited different interpretations. In the opening paragraph of the Preface Moore states that arguments on questions of fact can be as fully supported by reference to judicial authorities as arguments on questions of law and that his aim is to exhibit what American, Canadian and English judges have said 'concerning the causes of trustworthiness and untrustworthiness of evidence, and the rules for determining probative weight'.¹⁶⁵ A few pages later he modifies this by suggesting that only some such statements have become established as propositions of law,¹⁶⁶ but the preface and the book as a whole readily create the impression that it could provide authoritative material for arguments by counsel and rulings by judges on the proper weight to be attached to particular kinds of evidence. At first sight this might seem to be an example of the passion for indiscriminately collecting facts of which some of the scientific realists, such as Cook and Underhill Moore, were later accused.¹⁶⁷ This would be a caricature of Charles Moore, for his mistake was to collect non-existent rules rather than samples of facts.

The reviews of Moore's *Treatise* were interesting. An English reviewer saw it as 'an elaborate, exhaustive and successful assault' on Best's notion – which was, of course, really Bentham's – that questions of weight and credibility cannot be governed by rules.¹⁶⁸ Significantly several American reviewers doubted whether most of Moore's quotations from the law reports were 'really declarations of law and within the doctrine of *stare decisis*'.¹⁶⁹ Most pointed this out gently, while commending the

book as a rich storehouse of information which would be useful to practitioners by way of general instruction and in preparing cases, even if most of the material could not be explicitly cited in argument – ammunition for pocket pistol law. Wigmore, who was fond of Moore, felt bound to attack his work quite sharply, for he saw it as dangerous: ‘This treatise,’ he began, ‘is in performance exhaustive, in scope novel, in utility large, in avowed purpose it is partly good; partly it is what we should consider as bad as possible.’¹⁷⁰ For, he suggested, it is based on a fallacy, which is beginning to regain some ground, the idea that there are rules of weight:

If there is one thing for which the common law system of judge and jury stands, it is that the rules of evidence, as determined and applied by the judge, are rules of admissibility alone, and for the judge alone; the weight or credibility is for the jurors untrammelled by any rules of law . . . The counsel who uses this book to induce the judge to a ruling of law upon credibility is committing moral treason to our system.¹⁷¹

Wigmore’s view has generally prevailed. Moore seems to have made little impact and was soon forgotten. This is unfortunate for, as Wigmore acknowledged, it is a rich and fascinating compendium, in essence a judicial dictionary of quotations, full of delights and insights, certainly enjoyable, possibly useful, and dangerous only if misused.¹⁷² As one reviewer suggested, it is a lawyers’ book, if not a law book.¹⁷³ Thus Chamberlayne and Moore both failed for converse reasons: Chamberlayne went too far in trying to free the administration of evidence from all rules; Moore erred in the opposite direction, trying to subordinate all aspects of evidence to the governance of rules. Anglo-American practice, and its commentators, took a middle way, accepting most of Bentham’s thesis with regard to competency, weight and credibility, but rejecting it with regard to admissibility – at least in part.¹⁷⁴

After Thayer¹⁷⁵

Thayer’s failure to produce his promised treatise and the absence of serious competitors provided Wigmore with his opportunity. He took it with such conspicuous success that he earned more praise than his mentor and overshadowed all other writers on evidence for the next fifty years. It is, of course, quite misleading to depict Wigmore merely as a disciple of Thayer. Wigmore explicitly adopted Thayer’s general theory of the law of evidence and drew heavily on his historical researches; both belong to the central tradition of Evidence scholarship and share most of its basic assumptions, but the resemblance ends here. Thayer was a subtle intensive thinker; his forte lay in the penetrating analysis of sharply focused questions; he was a lawyer who became obsessed by a rather narrow kind of history. Wigmore’s talents were more extensive and systematic: he had broad legal interests and he was insatiably curious about other disciplines and other countries; he was an efficient and well-organized scholar with a great capacity for synthesis and simplification.

Their contributions to the theory of evidence are correspondingly different: Thayer provided the prevailing rationale for the law of evidence; Wigmore adopted

Thayer's theory as one part of a much broader inter-disciplinary 'Science' of Evidence and Proof.¹⁷⁶ The nature and quality of Wigmore's achievements have been explored elsewhere. Here it is worth noting one negative impact of his success. The next generation of specialists in evidence in the United States contained some men of outstanding ability: Morgan, Chafee, McCormick, and several others. They worked in the shadow of the master. Only one of them, McCormick, attempted to write a systematic treatise. This was quite modest in its stated aims and hid its light under a bushel, for McCormick was respected as a subtle and original thinker.¹⁷⁷ Whether Wigmore's dominance was the sole or even the primary cause, the first fifty years of the twentieth century represent a relatively fallow period, marked by much excellent and sophisticated work on particular topics, but more remarkable for the absence of attempts to develop general theories or to write systematic treatises as alternatives to Wigmore's.

There are, of course, some exceptions to these broad generalizations. Two deserve mention here. First, in this period a great deal of the energy of leading American evidence scholars, of whom Morgan was the most prominent, was channelled into drafting and debating proposed codes of evidence. The products of this long and complicated process were a series of consolidations and codes, notably the Model Code of Evidence (1942), the Uniform Rules of Evidence (1953), the California Evidence Code (first implemented 1965–7), the Federal Rules of Evidence (enacted 1975) and legislation based on one or other of these.¹⁷⁸ Although this movement towards codification represents the general trend in the direction of simplification and further narrowing of the scope of the formal rules of evidence, these codes represent achievements of pragmatic, incremental change based on compromise rather than a clear victory for Thayerism, let alone Benthamism.

One theorist who wrote in this period was Jerome Michael of Columbia, who for many years explored the theoretical foundations of evidence and civil procedure, including the logical and psychological dimensions of proof.¹⁷⁹ Much of the work was never completed, but a tentative edition of an ambitious theoretical book, written in collaboration with a philosopher, Mortimer Adler, was privately printed in 1931, as *The Nature of Judicial Proof, an Inquiry into the Logical, Legal, and Empirical Aspects of the Law of Evidence*.¹⁸⁰ Of this Wigmore wrote somewhat harshly: '[it] is a metaphysical analysis of the elements of probative reasoning; but its remarkable subtleties seem to have no more service for the practitioner than do the mathematical and physical formulas on which the physicist constructs his practicable microscope'.¹⁸¹

The period 1900–60 was also a fallow period for English Evidence scholarship and theorizing.¹⁸² The most notable contribution was the first edition of *Cross on Evidence*, which soon became recognized by practitioners and academics alike as the leading English work in the field.¹⁸³ Its success was in part indicative of a need: it helped to fill a vacuum. Its limitations are equally revealing of the state of the subject at the time. Cross was pragmatic in respect of both form and substance: he set out to cater for two rather different markets, students and practitioners,

simultaneously.¹⁸⁴ He sought to go beyond simple exposition to provide 'an up-to-date account of the theory of the subject'. But his notion of theory stopped at giving purported explanations for particular doctrines. Cross was a good expositor, clear and concise and with an excellent command of the case law. He also had a good sense of what issues practitioners thought important. But he set himself rather modest aims, he concentrated almost exclusively on the rules of evidence, and he exhibited little interest in the broader dimensions of the underlying theory of the subject or in its logical, psychological and empirical aspects.¹⁸⁵ The first edition of *Cross* contains no references either to Bentham or to Wigmore's *Science*.¹⁸⁶ His robust no-nonsense approach was typified by his remark, made in my presence: 'I am working for the day that my subject is abolished.'

Since 1960 there has been a slow, but steady, revival of interest in the study of evidence. In England a series of reports by the Law Reform Committee culminated in the Civil Evidence Acts of 1968 and 1972 which significantly reduced the scope and practical importance of the Law of Evidence in civil cases. On the criminal side, the Eleventh Report of the Criminal Law Revision Committee (1972) and the Report of the Royal Commission on Criminal Procedure (Philips Commission, 1981) both invoked Benthamite utilitarianism in rather dubious ways and stimulated public debates with strong echoes of the 1830s.¹⁸⁷ The main outcome was the Police and Criminal Evidence Act 1984, which represents a compromise that satisfies few people. During this period some notable contributions have been made by Commonwealth scholars and law reformers, but without producing any radical breaks with the predominant tradition.¹⁸⁸

In selecting only a few highlights from a vast mass of material I have no wish to slight either the learning or sophistication of much of the case law and secondary writings, especially in the periodicals, that appeared in the years between the establishment of Wigmore's supremacy and the late 1960s. Evidence has tended to attract some of the finest minds among legal scholars and, in the United States in particular, there has been great strength in depth. But most of the learning has been the Federal Rules and other quasi-codes of evidence has also created some hitherto unresolved problems for teachers of the subject. By simplifying the old law they have made some of the old learning obsolete, yet the new codes may not provide such a satisfactory basis for teaching skills of statutory interpretation as the Uniform Commercial Code or the Internal Revenue Code. Writing in 1977, shortly after the enactment of the Federal Rules, two leading commentators remarked: '... the field of evidence can use a bit of shaking up; it has become stagnant since the defeat of the last generation of reformers. It would be only a slight exaggeration to say that there has not been one significant contribution to the field in the last twenty-five years.'¹⁸⁹

From the perspective of 1984, this seemed to be a bit of an exaggeration. Today it no longer holds true. One of the reasons for this relative stagnation is that in England, the United States and other parts of the common law world, teaching, writing and thinking about evidence centred on the law of evidence. The scholars tended to

follow the rules. These have diminished in scope and declined in importance over the years; they have also tended to become simpler. A number of recent developments have taken the subject out of the doldrums. Significantly, each of these is concerned with aspects of evidence and proof that are largely independent of the technical rules.

First in time was the development of 'the new rhetoric' by Chaim Perelman and his associates.¹⁹⁰ This was a useful reminder of the close historical connection of questions of proof with classical and medieval rhetoric, which itself originally developed in large part in the forensic arena. It also showed that questions of fact pose as interesting and important problems of 'lawyers' reasonings' as questions of law.

A second, connected, development was a series of debates about the nature of probabilistic reasoning in forensic contexts. It is a commonplace of evidence discourse that triers of fact are concerned with 'probabilities, not certainties'. For many years almost no attention was given by lawyers to the nature of the probabilities that were involved, despite enormous interest in probability theory in several adjacent disciplines. Then, stimulated in part by some elementary statistical errors in the California case of *People v Collins*, a lively debate developed in the United States about the potential uses and abuses of mathematics in litigation.¹⁹¹ To begin with, the main participants took it for granted that all reasoning about probabilities is in principle mathematical; they disagreed about the correct way of applying the calculus of probability to particular situations and about the feasibility and desirability, as a matter of policy, of explicit resort to mathematical arguments in the courtroom. In the late 1970s whole books began to appear devoted to the application of statistics and mathematical probability to law.¹⁹² In 1977 a British philosopher, Jonathan Cohen, advanced the thesis that not all reasoning about probabilities is in principle mathematical (Pascalian) and that some judgements of probability can be appropriately justified and criticized on the basis of objective, non-mathematical (Baconian) criteria. He further argued that most, but not all, arguments about probabilities in forensic contexts fitted his Baconian theory of induction better than any of the standard versions of mathematical probability, and that most leading theorists of evidence, including Bentham and possibly Wigmore, were probably Baconians. Cohen's thesis stimulated lively debates in several disciplines, including law. These debates have not yet run their course.

A third, largely independent, development has been a revival of interest in law and psychology including, but not confined to, witness psychology. Between about 1890 and 1920 there was considerable interest in this field, especially in Germany and the United States. Then, for rather obscure reasons, interest almost completely died out for nearly fifty years. It began to revive in the 1960s, partly through the work of Lionel Haward, James Marshall, Arne Trankell and others. To begin with, much of the research was narrowly empirical and highly particularistic; but over time more critical and analytical approaches began to develop. By 1980 'Law and Psychology' had developed into an established field, especially in the United States.¹⁹³ As we shall see, in the past fifteen years the interests of specialists in fields as diverse as forensic

science and conversation analysis, phenomenology and statistics, literary theory and expert systems have converged on the processing and uses of information in litigation, and questions were being asked about the relations between these lines of enquiry and about their general significance. Theory was becoming respectable again.

The Rationalist Tradition

This survey of some of the highlights of the intellectual history of the specialized study of Evidence in England and the United States should at least be enough to suggest that the story is by no means a straightforward case-study of the development of a specialized branch of expository scholarship. From an early stage there was a continuing uneasiness about whether there were or should be any formal rules of evidence, what precisely might be the status of such rules (and, in particular, of judicial rulings on points of evidence) and about the scope of Evidence as a subject. There were recurrent tensions between authors' concerns and the demands of the market, so that there was often an uneasy fit between substantive content and literary form. Most writers could hardly fail to be aware of the artificiality of isolating the study of evidence from the study of procedure, of substantive law and of 'non-legal' dimensions, especially the logical, epistemological and psychological aspects. Yet the desire to systematize, to simplify and, in some instances, to codify generated equally strong pressures to draw the boundaries of evidence doctrine precisely and narrowly. The systematic exposition of the law of evidence on the basis of principle was a primary concern of Gilbert and most of his successors. For some, like Bentham and Chamberlayne, the fundamental principle was some version of free proof. Gilbert, Peake and several leading nineteenth-century writers each tried to subsume the rules of evidence under different versions of the 'best evidence rule'. Stephen purported to find a single unifying principle in the notion of 'relevance'. All of these efforts failed and, since Thayer, the modern tendency has been to see the law of evidence largely as a collection of disparate constraints on freedom of proof and free evaluation of evidence.¹⁹⁴

Evidence scholarship has also been a forum for a series of protracted controversies. Some of these belong fairly specifically to the study of evidence – conceptual disagreements, the debates about presumptions, hearsay and the best evidence rule, for example. Others represent particular applications of standard legal or juristic controversies, such as debates about the pros and cons of the jury or the adversary system or judge-made law or codification. Some, such as disagreements between utilitarians and deontologists, between civil libertarians and proponents of 'law and order', between Pascalians and Baconians, and more recently between atomists and holists, reflect wider differences. There is a remarkable degree of continuity about some of these controversies: for example, a reader of the *Edinburgh Review* in the eighteen-twenties and thirties would have found a great deal that was familiar in recent debates in England about the reform of criminal evidence and procedure.¹⁹⁵

Table 1. *The Rationalist Tradition: basic assumptions*

Model I A Rationalist model of adjudication	Model II Rationalist theories of evidence and proof: some common assumptions
A <i>Prescriptive</i>	1 Knowledge about particular past events is possible.
1 The direct end	2 Establishing the truth about particular past events in issue in a case (the facts in issue) is a necessary condition for achieving justice in adjudication; incorrect results are one form of injustice.
2 of adjective law	3 The notions of evidence and proof in adjudication are concerned with rational methods of determining questions of fact; in this context operative distinctions have to be maintained between questions of fact and questions of law, questions of fact and questions of value and questions of fact and questions of opinion.
3 is rectitude of decision through correct application	4 The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty.
4 of valid substantive laws	5 (a) Judgements about the probabilities of allegations about particular past events can and should be reached by reasoning from relevant evidence presented to the decision maker; (b) The characteristic mode of reasoning appropriate to reasoning about probabilities is induction.
5 deemed to be consonant with utility (or otherwise good)	6 Judgements about probabilities have, generally speaking, to be based on the available stock of knowledge about the common course of events; this is largely a matter of common sense supplemented by specialized scientific or expert knowledge when it is available.
6 and through accurate determination	7 The pursuit of truth (i.e. seeking to maximize accuracy in fact-determination) is to be given a high, but not necessarily an overriding, priority in relation to other values, such as the security of the state, the protection of family relationships or the curbing of coercive methods of interrogation.
7 of the true past facts	8 One crucial basis for evaluating 'fact-finding' institutions, rules, procedures and techniques is how far they are estimated to maximize accuracy in fact-determination – but other criteria such as speed, cheapness, procedural fairness, humaneness, public confidence and the avoidance of vexation for participants are also to be taken into account.
8 material to	9 The primary role of applied forensic psychology and forensic science is to provide guidance about the reliability of different kinds of evidence and to develop methods and devices for increasing such reliability.
9 precisely specified allegations expressed in categories defined in advance by law i.e. facts in issue	
10 proved to specified standards of probability or likelihood	
11 on the basis of the careful	
12 and rational	
13 weighing of	
14 evidence	
15 which is both relevant	
16 and reliable	
17 presented (in a form designed to bring out truth and discover untruth)	
18 to supposedly competent	
19 and impartial	
20 decision makers	
21 with adequate safeguards against corruption	
22 and mistake	
23 and adequate provision for review and appeal.	
B <i>Descriptive</i>	
24 Generally speaking this objective is largely achieved	
25 in a consistent	
26 fair	
27 and predictable manner.	

Note: Prescriptive rationalism: acceptance of A as both desirable and reasonably feasible. No commitment to B.
Complacent rationalism: acceptance of A & B *in re* a particular system.

Despite these strains and disagreements there is a truly remarkable homogeneity about the basic assumptions of almost all specialist writings on evidence from Gilbert through Bentham, Thayer and Wigmore to Cross and McCormick. Almost without exception Anglo-American writers about evidence share very similar assumptions, either explicitly or implicitly, about the nature and ends of adjudication, about knowledge or belief about past events and about what is involved in reasoning about disputed questions of fact in forensic contexts. They differed about such matters as the scope of and the need for rules of evidence, about the role and rationale of the law of evidence in general, about the details of particular rules and about many other things. But these disagreements have by and large taken place within a shared framework of basic assumptions and concepts.¹⁹⁶

These assumptions can be conveniently summarized in the form of two models or ideal types which are set out in table 1. The first Model reconstructs a Rationalist Model of Adjudication; the second attempts to articulate the main epistemological and logical assumptions of standard evidence discourse to be found in specialized secondary writings about evidence in the Anglo-American tradition.

If the propositions of the second Model represent standard elements in rationalist theories of evidence, it should be clear that it is artificial to make a sharp distinction between theories of evidence and theories of adjudication: generally speaking the former presuppose or form part of the latter. However, it is necessary to proceed with caution, partly because by no means all evidence scholars articulated clear and developed statements of their views about adjudication, and partly because there appears to be less of a consensus in the relevant literature about the ends and the achievements of the Anglo-American system of adjudication than about the logic and epistemology of proof. It is, however, possible to postulate a rationalist model of adjudication as an ideal type which both fits a rationalist theory of evidence and is recognizable as a reasonably sophisticated version of a widely held, if controversial, view. The first Model is a modified version of a Benthamite model of adjudication, presented in a way which suggests a number of possible points of departure or disagreement. Although by no means all leading Evidence scholars have been legal positivists and utilitarians, a rationalist theory of evidence necessarily presupposes a theory of adjudication that postulates something like Bentham's 'rectitude of decision' as the main objective. There is scope for divergence on a number of points of detail, but not from what might be called 'the rational core'.¹⁹⁷

It is reasonable, and sufficient for present purposes, to assert that by and large the leading Anglo-American scholars and theorists of evidence from Gilbert to Wigmore (and, for the most part, until the present) have either implicitly or explicitly accepted such notions as these, although not in this particular formulation. Central to this model are two ideas: first that the Anglo-American system has adopted a 'rational' mode of determining issues of fact in contrast with older 'irrational' modes of proof.¹⁹⁸ Secondly, a particular view of 'rationality' was adopted or taken for granted. This found its classic expression in English empirical philosophy in the writings of Bacon, Locke and John Stuart Mill. But for the ungainliness

of the term, it would be appropriate to refer to this 'intellectual mainstream' as the Classical Rationalist Tradition of Evidence Scholarship, in order to emphasize 'rational proof' as its central idea and a particular view of rationality as one of its basic assumptions.¹⁹⁹

The characteristic assumptions of discourse about evidence within the Rationalist Tradition can be succinctly restated as follows: epistemology is cognitivist rather than sceptical; a correspondence theory of truth is generally preferred to a coherence theory of truth;²⁰⁰ the mode of decision making is seen as 'rational', as contrasted with 'irrational' modes such as battle, compurgation, or ordeal; the characteristic mode of reasoning is induction; the pursuit of truth as a means to justice under the law commands a high, but not necessarily an overriding, priority as a social value.

This account of the Rationalist Tradition has both an analytical and an historical aspect.²⁰¹ Analytically it is an attempt to reconstruct in the form of an 'ideal type' an account of a set of basic assumptions about the aims and nature of adjudication and what is involved in reasoning about disputed questions of fact in that context. The test of success of this ideal type is its clarity, coherence, and usefulness as a tool of analysis of evidence discourse and doctrine.

The historical thesis is more cautious. It advances the hypothesis that, by and large, the works of most of a list of named writers on evidence either articulated or assumed ideas that were close to the ideal type. The historical claim should be treated with caution for two main reasons. First, it is a tentative hypothesis based on selective sampling of works of a few writers. Even in respect of those named individuals the hypothesis needs to be tested and refined by much more detailed research. For example, no systematic attempt has been made to test the hypothesis in respect of judicial discourse in appellate cases or in writings by continental European writers on evidence.²⁰² It would be surprising if there were not some significant deviants,²⁰³ but I would also be surprised if sufficient evidence were adduced to refute the claim that the predominant Anglo-American tradition of specialized discourse about evidence is remarkably homogeneous in respect of its basic underlying assumptions which are rooted in eighteenth-century Enlightenment Rationalism.

The emphasis on specialized discourse is crucial. For it is part of my wider thesis that there is a sharp contrast between writings about evidence and the much more varied, often sceptical, literature(s) about litigation, legal processes, and procedure. Part of the argument is that our heritage of specialized evidence discourse became artificially isolated from these other bodies of literature and from broader movements in ideas and that the time is ripe for a rethinking.

The second caveat about the historical thesis relates to the first part of the ideal type. This is based explicitly on Bentham's ideas, deliberately set out in a way that signals clearly and provocatively a whole range of possible points of departure from this model. One reason for constructing it in this way was to try to facilitate the pinpointing of differences between Bentham's powerful, but simplistic, theory of procedure, and existing and possible alternatives.²⁰⁴ A second reason is that, as we have seen, it is much harder to make confident assertions about evidence specialists'

underlying theories of adjudication and procedure because these are relatively rarely articulated in a coherent fashion.²⁰⁵ There are clearly some tensions between the first Model and the ‘ideal type’ of adversarial procedures. One could expect detailed research to reveal such tensions and more divergences by writers on evidence from Model I than from Model II.²⁰⁶

The claim that the modern system of adjudication is ‘rational’ is a statement of what is considered to be a feasible aspiration of the system; it does not necessarily involve commitment to the view that this aspiration is always, generally, or even sometimes, realized in practice. It is commonplace within the Rationalist Tradition to criticize existing practices, procedures, rules and institutions in terms of their failure to satisfy the standards of this aspirational model.

Part A of Model I is prescriptive: it states an aspiration and a standard by which to judge actual rules, institutions, procedures and practices. Acceptance of such standards involves no necessary commitment to the view that a particular system, or some aspect of it, at a particular time satisfies these standards either in its design or in its actual operation. Part B of the model is intended to represent typical claims or judgements of the kind ‘on the whole the system works well’. None of the leading theorists in the Rationalist tradition were perfectionists who expected one hundred per cent conformity with the ideal. Some were highly critical of existing arrangements and practices. Indeed Bentham, whose *Rationale of Judicial Evidence* is the main source of the model, made his theory of adjudication the basis for a radical and far-ranging critique of English (and, to a lesser extent, Scottish and continental) procedure, practice and rules of evidence in his day. It is, of course, possible to explore how far any individual writers have been complacent, either generally or in particular respects, about the design or practical operation of their own system; but this kind of judgement involves an additional step – moving from prescribing general standards to applying them to particular examples.

Thus it is important to distinguish clearly between aspirational and complacent rationalism in respect of adjudication. It is also useful to differentiate a third category, which might be referred to as optimistic rationalism. For in invoking prescriptive standards one often makes some judgement about the prospects for attaining or approximating to such standards in practice in a given context: in the case of many writers on evidence and judicial process who accepted some variant of Part A of the rationalist model of adjudication, it is reasonable to attribute to them the view that its standards represent a feasible aspiration rather than a remote or unattainable Utopian ideal. Even virulently critical writers, such as Bentham and Frank, can be shown to have believed that their own favoured recommendations would in practice lead to significant increases in the level of rationality in adjudication. They were optimistic rationalists. Nearly all of the literature on evidence that has been discussed in this essay is generally optimistic in this sense. In brief: almost all the leading writers in the mainstream of Anglo–American Evidence scholarship were aspirational rationalists, most were optimistic rationalists most of the time,

and many, but by no means all, were fairly complacent about the general operation of the adversary system in their own jurisdiction in their day.

The general tendency of Anglo–American Evidence scholarship is not only optimistic, it is also remarkably unsceptical in respect of its basic assumptions. Hardly a whisper of doubt about the possibility of knowledge, about the validity of induction, or about human capacity to reason darkens the pages of Gilbert or Bentham or Best or Thayer or Wigmore or Cross or other leading writers.²⁰⁷ Confident assertion, pragmatic question-begging or straightforward ignoring are the characteristic responses to perennial questions raised by philosophical sceptics. At first sight this may seem rather surprising, given the sceptical tone of a great deal of writing about judicial processes since the time of Holmes.

There is thus a sharp contrast in tone between the optimistic, often bland, rationalism of specialized writings on evidence and the sceptical tendencies in much recent writing about judicial process. The contrast, however, may be more of style than of substance, for the main thrust of critical writings is directed at the design and the actual operation of a particular system and the claims that are made for it, rather than at the underlying philosophical assumptions and aspirations of the Rationalist Tradition. The principal target is complacent rather than aspirational rationalism. In the next chapter I shall argue that many seemingly sceptical writers about judicial processes invoke standards which are identical or similar to those outlined in the rationalist model of adjudication and that, in law as elsewhere, genuine philosophical sceptics are rare birds. In brief, they are not so far removed from aspirational, even optimistic, rationalism as the sceptical tone of some of their writings suggests. If this is correct, it suggests that the obstacles to a reintegration of the literature on evidence and on the processes which constitute the context of disputed questions of fact about particular past events may not be as great as appears on the surface. There are genuine difficulties and disagreements, but they are shared by several specialized fields of enquiry that have grown apart.

Reintegration is surely needed. For the Rationalist Tradition of Evidence scholarship, by dint of its artificial isolation, has paradoxically produced a corpus of literature which is notable both for scholarly excellence and conceptual sophistication and for a series of recurrent controversies which even some of the leading protagonists acknowledge are ‘high among the unrealities’. Evidence scholarship has a lot to offer and a lot to learn.

The Rationalist Tradition: a postscript

Since the original version of this essay was published in 1982 it has been the subject of a good deal of comment and discussion in print and in seminars and conferences.²⁰⁸ The historical thesis has so far been accepted as generally correct although, as I have suggested, detailed investigation and analysis is likely to yield a more complex story.²⁰⁹ The two models have also been accepted as a coherent and analytically useful ideal typical reconstruction of an orthodoxy and have been subject to only

a few verbal amendments. However, commentators have raised three general questions that deserve a response: first, have there been any significant deviants from the orthodoxy? Secondly, what is the political or ideological significance of the Rationalist Tradition? What is its relationship, both historical and logical, to a particular 'ideology' or creed, such as Benthamism or 'Liberal Legalism'?²¹⁰ To what extent can this ideal type accommodate substantial internal political disagreements on important issues? Finally, several civilian proceduralists have posed in a sharp form a question that had already troubled me.²¹¹ The point may be restated as follows: although this ideal type has been reconstructed from Anglo-American writings it seems to fit an 'inquisitorial' model of procedure better than an 'adversarial' one. For it is generally recognized that inquisitorial systems are more directly and consistently concerned with the pursuit of truth and the implementation of law than adversarial proceedings, the primary purpose of which is legitimated conflict-resolution. Is there not, therefore, a tension between adversarial proceedings and the formulation of the ends of procedure in Model I?

These are all worthwhile and complex questions which deserve attention. Without trying to do justice to them here, it may be helpful to give some preliminary indications by way of response.

Deviants

The Rationalist Tradition is presented in the form of an 'ideal type' to which the ideas of the authors discussed in the text, and many other Anglo-American writers about evidence, appear to conform more or less closely. The historical thesis is cautious, partly because of the danger of generalizing about the ideas (many of them implicit) of authors writing at different times in different contexts and partly because more detailed research and analysis than I have undertaken could be expected to uncover some significant refinements and deviations. Even Bentham's epistemology, as embodied in his theory of fictions, is a good deal more complex and subtle than is suggested by the bald formulations in Model II, 1–6.²¹² Of specialist writers on evidence who published before 1980, the two leading candidates for treatment as deviants seem to be James Glassford and Kenneth Graham Jr.

James Glassford (obit 1845) was a Scottish Advocate and Sheriff-Depute.²¹³ His work *An Essay on the Principles of Evidence and Their Application to Subjects of Judicial Enquiry* (1820) was originally intended as a contribution to the *Supplement of the Encyclopaedia Britannica*, but was published separately because of its length. This interesting work has been well described and analysed by Dr M. A. Abu Hareira.²¹⁴ He convincingly shows that Glassford was a pioneering exponent of a 'holistic' approach to the evaluation of judicial evidence and that he challenges the 'atomistic' approaches of writers in the Rationalist Tradition (including both Baconians and Pascalians in recent debates about probabilities and proof). I shall argue later that, while a sound theory of reasoning about disputed questions of fact needs to take account of narrative coherence and other 'holistic' ideas, it is a mistake to treat atomism and holism as rival or incompatible approaches.²¹⁵ However,

'holism' does raise questions about the acceptability of the particular conceptions of rationality adopted or assumed by writers in the Rationalist Tradition. The significant point is that at least one Scottish writer on evidence belonged to a different philosophical tradition (the commonsense school) from that of early English writers on evidence, such as Gilbert, Bentham and Evans; a similar challenge is mounted by contemporary theorists who draw some of their inspiration from continental European philosophy (for example, Hegel or Habermas)²¹⁶ or, in the case of Abu Hareira, Islamic ideas.

Professor Kenneth Graham Jr has launched a series of attacks on what he calls 'Progressive Proceduralism', which invites interpretation as the twentieth century American branch of the Rationalist Tradition.²¹⁷ Graham characterizes Progressive Proceduralism as being based on 'Benthamite ideology'. The motives and methods of his attack are overtly political. However, he acknowledges that its opponents have so far not developed an 'alternative model'²¹⁸ and his own version of an 'Irrealist Theory of Evidence', while revealing, can most charitably be interpreted as parody.²¹⁹ Graham's most substantial contribution to date has been the four volumes and supplements on evidence in the encyclopaedic *Federal Practice and Procedure*.²²⁰ The constraints of compiling a reference work for practitioners have not entirely curbed Graham's ebullience nor concealed his values, but it is not yet possible to reconstruct a coherent alternative theory from his published work, which could be located on the fringes of critical legal studies. Graham offers a sharp political challenge to orthodox evidence theory, but whether acceptance of his political views would necessarily involve rejecting any central ideas of the Rationalist Tradition is an open question.

Ideology

Graham's attitude to 'Progressive Proceduralism' and his interpretation of 'Benthamite ideology' at least have the virtue of raising some important issues about the ideological significance of the basic assumptions of the Rationalist Tradition. His account of 'the Progressive Paradigm' in the United States emphasizes several ideas: 'the purpose of Litigation is to vindicate the substantive law so as to make relationships predictable and certain'; fact-finding is best done by scientific experts rather than lay jurors; it favours increase of judicial discretion in admitting evidence; and, as part of a more general concern to establish 'the neutrality' of law and procedure, it disguises the infusion of repressive values into procedural arrangements by treating the latter as neutral instruments of positive law. In short, the Rationalist Tradition is an obfuscating ideology which has been used to legitimate institutions and doctrines that uphold an ethos of social control, which is technocratic, hierarchical, centralized and statist.²²¹

The details of Graham's challenge have been considered and criticized at length elsewhere.²²² Stripped of its excesses it can be interpreted as raising some important questions about the political significance of the Rationalist model viewed as a reconstruction of the basic assumptions of a rather stable intellectual tradition. First, if the

historical thesis is correct, does it follow that all of our leading writers on evidence were, consciously or unconsciously, committed to an ideology of centralized statist social control? Secondly, to what extent does adherence to the central tenets of the Rationalist Tradition preclude significant political disagreements? These are important and complex questions and I cannot hope to do justice to them in brief compass. However, it is worth responding to the challenge by outlining my position on them.

The central tenet of the Rationalist Tradition is that the direct end of adjective law is the achievement of rectitude of decision in adjudication. In respect of questions of fact, that involves the pursuit of truth about particular past events through rational means. Rectitude of decision is given a high, but not an overriding, priority as a means to securing justice under the law (expletive justice). The model is instrumentalist in that the pursuit of truth through reason is a means to expletive justice, that is, the implementation of substantive law.²²³

Does acceptance of such basic ideas necessarily involve commitment to centralized statist social control? Some clues to this complex question are to be found in Mirjan Damaska's masterly analysis of procedural systems.²²⁴ Any procedural system, he suggests, can be interpreted in terms of the interaction between ingredients of three ideal types relating to *systems of government* ('the managerial state' and 'the reactive state'); hierarchical and coordinate *systems of authority*; and inquisitorial (inquest) and adversarial (contest) *systems of procedure*. Damaska suggests that nearly all historical examples of actual systems of each kind are hybrids, combining elements of each ideal type in complex ways, and that there is no stable correlation between the different ideal types: for example, while one might expect a managerial state to have a hierarchical system of authority and a primarily inquisitorial system of procedure, this is not a matter of logical or historical or institutional necessity. Most actual systems reflect complex compromises, some of which are more 'comfortable' than others. Thus, in the present context, the Rationalist model is compatible with coordinate as well as hierarchical authority and even with adversarial systems of procedure, although there are some admitted tensions in the latter case.²²⁵ Thus, at this very abstract level, there is no necessary incompatibility between the central tenets of the Rationalist Tradition and democratic systems of government, decentralized coordinate authority and adversary proceedings.

Before moving to a more concrete level, it is worth making two theoretical points: first, like Damaska's three models, the Rationalist Tradition is an 'ideal type'; that is an interpretative tool, to be evaluated in the first instance by its clarity, coherence and explanatory power. The historical claim that by and large most Anglo-American specialized writings on evidence have approximated to that type is an application of that tool to particular data. This claim could be refuted or modified or reinterpreted by more detailed research and analysis without invalidating the model.

Secondly, the distinctions between aspirational, optimistic and complacent rationalism are important in interpreting our heritage of evidence scholarship.²²⁶ My ideal type is in first instance normative and aspirational: it reconstructs a prescriptive design theory. Writers within this tradition diverge as to the feasibility of the

aspiration and even more on the extent to which they believe that the aspiration is realized in practice at a particular time and place. Bentham, for example, used his theory of adjective law as the basis for a radical critique of early nineteenth-century English institutions, doctrines and practices. Frank, while emphasizing the obstacles in the way of ever achieving the ideal, invoked much the same values in advocating somewhat less sweeping reforms of the American system of his day.²²⁷ Other writers have varied both in the degree of their complacency about existing arrangements in their own systems and in respect of optimism or pessimism about the feasibility of change. The essays in this book explore critically and selectively how far some ingredients of the aspirational model, or the model as a whole, require more fundamental rethinking in the light of recent intellectual developments.

Against this background, it is worth asking how far genuine political or ideological differences can be (and have been) accommodated within the tenets of the Rationalist Tradition. I shall defer until later consideration of examples of radical ideological scepticism, such as that all our inherited evidence discourse is little more than a form of bourgeois mystification which serves to legitimate a system that is rotten to the core, or the slightly more subtle thesis that this inheritance is just another example of 'liberal legalism' that is irreparably flawed by inescapable contradictions.²²⁸ Here some more specific examples will suffice to illustrate two related points: first, that the model of the Rationalist Tradition has been constructed in such a way as to accommodate some genuine political differences; secondly, that not all the disagreements and differences between writers within the tradition are sensibly characterized as 'political', except in some trivial sense.

The most familiar disagreements about evidence relate to the position of persons suspected of or charged with criminal offences. In England such debates have been a recurrent feature of public life for over two hundred years, with the polemical battle lines being drawn with monotonous regularity and very similar arguments being adduced by each side when the issues periodically resurface.²²⁹ In the United States, and more recently in Canada, an additional constitutional dimension has featured in a similar recurrent cycle.²³⁰ While the details and the rhetoric may change, the central issues remain relatively stable and can generally be formulated in terms compatible with the Rationalist model: what priority should be given to rectitude of decision on the one hand and process values and the avoidance of vexation on the other? What priority should be given to the principle of avoiding conviction of the innocent over the objective of crime prevention? When, if ever, should rules of evidence be used as means of preventing or deterring illegal or improper police behaviour, even at the expense of rectitude of decision? And so on. Most of these debates can be interpreted as debates within the Rationalist Tradition although, as I shall argue later, my particular formulation is sufficiently Benthamic to put non-utilitarians at a disadvantage.²³¹ This general claim applies *pari passu* to debates about particular topics such as the privilege against self-incrimination, the right to silence, 'fruits of the poisoned tree', the presumption of innocence and many other familiar, regularly contested matters.

A rather different set of debates relates to what constitute valid and cogent modes of reasoning about disputed questions of ‘fact’. There is, first, the recent debate about probabilities and proof.²³² This seems to me to be in the first instance an apolitical debate about fundamental issues in the theory of probabilities. Interestingly, it has an important political dimension. Jonathan Cohen (the leading modern Baconian) has conducted a sustained campaign against the cult of the expert in psychology and diagnostic medicine, as well as in law.²³³ Ordinary adults, such as jurors, patients, and subjects of psychological experiments have a ‘general cognitive competence’ to make rational judgements about questions of fact, because the appropriate form of reasoning in this context is ordinary practical reasoning which conforms to Cohen’s model of inductive probability better than the less accessible mathematical models. But the grounds for his logical theory are independent of his (political) argument about the dangers of misuse of statistical theory by experts. Similarly, Laurence Tribe has argued against the overt use of mathematical argument in courts as politically dangerous even though, unlike Cohen, he assumes that the correct model for such reasoning is in principle mathematical.²³⁴ In short Pascalians and Baconians can become political allies in defending juries and other participatory institutions against the potential misuse of specialist knowledge by decision theorists and other ‘experts’. These disagreements also fit within the framework of the Rationalist Tradition.

The debate between ‘atomists’ and ‘holists’ similarly has political as well as analytical dimensions. Whether ‘holistic’ elements can be accommodated within our conception of rationality is in the first instance a philosophical question which can and should be separated from one’s political preferences. However, in the context of litigation, I shall argue that there is a tendency for holistic thinking to subvert sharp distinctions between fact and law, fact and value, and law and value.²³⁵ For me this presents a political dilemma: on the one hand I am sympathetic to the introduction of community values in the administration of justice; on the other hand, such values may include social, sexual or other ‘prejudices’ that offend my liberal beliefs, and giving free play to holism may subvert important principles, such as the principle ‘judge the act, not the actors’.

The Rationalist model and adversary proceedings

Finally, it has been suggested that the two models of the Rationalist Tradition, taken together, fit inquisitorial systems better than adversarial ones.²³⁶ This raises important questions both about the internal coherence of the Rationalist Tradition and about the implications of my story for interpretation of civilian systems. The issues are complex and deserve to be explored further on another occasion. Here I shall merely sketch the outline of a possible answer. First, it is widely acknowledged that both Anglo–American and continental European systems contain hybrid mixtures of adversarial and inquisitorial features.²³⁷ In so far as the Anglo–American system fits the model of inquest rather than contest, the specific question under discussion does not arise.

Secondly, ‘inquest’ and ‘contest’ as ideal types are total process models of procedural systems. Models I and II, on the other hand, focus on the adjudicative stage of litigation, a stage which is generally not reached in practice in the Anglo–American system because of such devices as settlement out of court and guilty pleas. If we were to widen the subject of ‘judicial evidence’ to encompass all aspects of the processing and uses of information in litigation, a much more complex set of assumptions would be indicated.²³⁸

Thirdly, within a general theory of dispute-settlement, third-party adjudication is one recognized means among many for achieving the goal of resolution of conflict. Legal process scholarship recognizes this with varying degrees of clarity: for example, non-prosecution, freely negotiated compromise, pressured settlement, abandonment and surrender.²³⁹ It need not occasion surprise if the standards of correct decision by adjudicators in contests are not fundamentally different from the standards for adjudication in inquests. Adjudicative decisions that serve different procedural ends may share many key features.

Finally, some of the leading evidence writers in the Rationalist Tradition, including Bentham and Wigmore, were either highly critical of or deeply ambivalent about many adversarial aspects of common law proceedings. Conversely, some apologists for the adversary system claim, *inter alia*, that it has the more efficient methods of ascertaining the truth, even if it is less committed to this end.²⁴⁰ It is not possible to do justice to these complex issues here. Perhaps enough has been said to indicate the problematic nature of the relationship between discourse about evidence and proof on the one hand and different procedural contexts on the other.

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1 Thayer (1898), 198–9.

2 The quotations are from Shakespeare, *Richard II*, 1.1.

3 Standard accounts of ‘irrational’ modes of dispute-settlement include Thayer *Treatise*, ch. 1; Lea (1878); Goitein (1923); Caenegem (1973), ch. 3; Diamond (1971), esp. ch. 21; S. Roberts (1979); Hyams (1981). In an amusing article Ireland (1980) develops the theme, found elsewhere in the literature, of the marginality and unpopularity of ordeal and battle in many contexts. Cf. Harman J. in *Serville v Constance* [1954] 1 WLR 487, at 491, regretting that conflicting claims to the title of Welterweight Champion of Trinidad could not be settled by battle. On Judge Bridlegoose, see below, 117–22.

4 There was, however, no attempt to call or examine witnesses or adduce other evidence in support of the facts alleged.

5 Thayer, (1898), 10, n. 1.

6 On rhetoric see, e.g., Kennedy (1963, 1972, 1980); Perelman and Olbrechts-Tytecha (1971); Goodrich (1986). On the numerical system of proof see Kunert (1966–7).

On the history of probability theory see Hacking (1975) and Shapiro (1969, 1983). On the history of forensic science see Smyth (1980) and Lambourne (1984). On forensic psychology see Lloyd-Bostock (1980, 1988a) and Trankell (ed.) (1982). On the comparative study of procedure see Damaska (1973, 1986). On the history of Criminal Procedure see Langbein (1974, 1978, 1983). [On more recent historical literature, see the Preface, above.]

- 7 General surveys of the history of the law of evidence, including writers on evidence, are to be found in 1 Wigmore *Treatise* (Tillers rev., 1983), Wigmore (1983), s. 8, which also contains a useful bibliography; Holdsworth (1903–38), esp. vol. 1, 299–312; vol. 9, 127–222; vol. 12, 365–7; vol. 13, 466–8, 504–10; vol. 15, 138–42, 307–10; Holdsworth (1925), 116–22; Nokes (1967), ch. 2. Thayer *Treatise* remains the classic study of many aspects of the history of evidence. See also Wright and Graham (1977), ch. 1. ‘Some of the most fundamental attributes of modern Anglo–American criminal procedure for cases of serious crime emerged in England during the eighteenth century: the law of evidence, the adversary system, the privilege against self-incrimination, and the main ground rules for the relationship of judge and jury,’ Langbein (1983), 2. Much of the evidence for this claim is gathered in Langbein (1978). Short biographies of several of the writers discussed in this chapter can be found in Simpson (ed.) (1984a).
- 8 Lords’ Journal, 25 February 1794. On Burke’s interpretation of the ‘best evidence rule’ and Christian’s challenge to it, see Thayer *Treatise* 492–5. Cf. 1 Wigmore *Treatise*, 237. [On the modern survival of the ‘best evidence’ rule as a principle, see Nance (1988).]
- 9 Wigmore, *Treatise*, 238.
- 10 Gilbert (1754), 1. On the relationship of Gilbert’s treatise to Hale and to broader intellectual developments in the seventeenth century see Shapiro (1983), ch. 5. See also Abu Hareira (1984, 1986).
- 11 Gilbert (1954), 4.
- 12 3 *Commentaries*, ch. 23.
- 13 VI *Works*, 142–5, 183–7.
- 14 *Ibid.*, 144.
- 15 *Ibid.*, 186.
- 16 *Ibid.*, 144.
- 17 *Ibid.*, 186–7.
- 18 L. J. Cohen (1980a).
- 19 Thayer (1898), ch. 11.
- 20 *Ibid.*, 506.
- 21 For a detailed account of Bentham on Evidence see *TEBW*.
- 22 The most important of these are *Scotch Reform* and *Court of Lords Delegates*. An attenuated version of the former appears in V *Works*, 1–53; recent research by Ms Claire Gobbi suggests that there is much of interest in these works which survives unpublished in the Bentham papers. For details see Twining (1986a) and *TEBW*. [The Bentham Project has recently restarted work on editing *The Rationale of Judicial Evidence*.]
- 23 Halévy (1955 edn), 383.

- 24 VII *Works*, 384.
- 25 VII *Works*, 599. On the anti-nomian thesis see below, 233–4, n. 81.
- 26 L. J. Cohen (1977), 54–6. Bentham’s epistemology, as embodied in his theory of fictions, is generally regarded as ahead of its time. Most evidence writers have adopted a less sophisticated version of Lockean empiricism, Postema (1983), *TEBW*, 52–68.
- 27 Postema (1977); see further Postema’s excellent work, *Bentham and the Common Law Tradition* (1986), cf. *TEBW*, 74–5.
- 28 Bentham (1825), 180 (hereafter *Treatise*).
- 29 VI *Works*, 216.
- 30 See generally Bentham (1838–53), App. A; VI *Works*, 151–2; (1827), B. 6; *Treatise*, 180–3. See further below, ch. 6.
- 31 Wigmore (1942), 26; ABAJ, 476, 477.
- 32 Wigmore *Science*, 5 qualified on hearsay, *ibid.*, 944.
- 33 [In the case of child witnesses, reference should be made to the Criminal Justice Act 1988, s. 34. On further inroads into corroboration, see Birch (1995).]
- 34 Thayer *Treatise*, 265. See further below, ch. 6.
- 35 [This statement has proved to be unduly optimistic. In both the United Kingdom and the United States the ‘war on terror’ has resulted in a raft of changes that have overridden many safeguards. The Blair government has also introduced a series of reforms of criminal evidence that have, in almost all cases, eased the task of the prosecution. There has also been a tendency to simplify the law of evidence and to put it on a statutory basis, but in a piecemeal fashion that falls far short of codification. On the other hand, the Human Rights Act 1998 has potentially significant implications for criminal evidence, which have yet to be realized (Choo and Nash (2003), Roberts and Zuckerman (2004) 32–37 and *passim*; Sedley (2005) at 7, Stein (2005)). See further below, 229 n. 29 and annotations to ch. 6. For a powerful argument against ‘the Abolitionist Wave’ and free evaluation of evidence, see Stein (2005), ch. 4.]
- 36 Twining (1980a), 8–9. The argument of exaggerated importance in respect of the modern law of evidence is examined in ch. 6 below.
- 37 See e.g. VI *Works*, 6n.
- 38 Archbold (1822). On treatises of this period see Shapiro (1983), ch. V.
- 39 Pothier (1761, 1806).
- 40 Article on W. D. Evans in the *Dictionary of National Biography*.
- 41 W. D. Evans (1803).
- 42 *Ibid.*, Preface, iv.
- 43 1 Wigmore *Treatise*, 238.
- 44 W. D. Evans in Pothier (1806), 40.
- 45 Cheshire and Fifoot (1969), 20–1.
- 46 W. D. Evans in Pothier (1806), 95.
- 47 *Ibid.*, 96.
- 48 *Ibid.*, 148.
- 49 *Ibid.*, esp. 148–9.
- 50 *Ibid.*, 262.

- 51 Ibid.
- 52 Ibid., 301.
- 53 See e.g. 40–1, 225, 300–1. Evans and Bentham were contemporaries and corresponded briefly. See *The Correspondence of Jeremy Bentham*, vol. 8 (ed. S. Conway, CW, 1988), 442, 525. How far either author influenced the other in respect of evidence is uncertain – there is almost no direct evidence on the point.
- 54 W. D. Evans (1803), iv.
- 55 1 Wigmore *Treatise*, 238.
- 56 W. D. Evans (1803) Preface, iv, n. 40.
- 57 W. D. Evans (1803), Preface.
- 58 W. D. Evans (1803), Preface.
- 59 See the article on Starkie in the *Dictionary of National Biography*.
- 60 Kenny (1928), 319.
- 61 Evans (1803), Preface.
- 62 Ram (1861); C. C. Moore (1908). On Moore, see below; of the former one reviewer wrote: ‘Mr Ram has achieved the triumph of making romance and poetry the staple materials of a legal treatise. Extracts from the novelists, varied with hexameters, epigrams, odes and blank verse, are scattered broadcast upon its pages . . . A couplet or an epigram apropos of the subject frequently imparts grace and piquancy to the style of a writer; but when paltry truisms are solemnly enunciated to foist upon the reader long passages from *Noctes Ambrosianae* or the *Satires* of Juvenal, it is not simply bad taste, but pedantry’ (1861–2 12 *Law Magazine and Law Review*, 163).
- 63 Preface to 1st edn of Wills (1838).
- 64 Wills (1838), ch. 8.
- 65 See Best (1849), *passim*, esp. 32–3, 49–50, 60, 72–5, 98, 114, 165. See also Best (1856–8), 209, which contains a general critique of Bentham’s attitude to codes and to the legal profession, including ‘Judge and Co.’ See further *TEBW*.
- 66 Best (1849), 72.
- 67 8th edn (1893), Preface.
- 68 J. F. Stephen (1876), Introduction.
- 69 Chafee (1922–3). Cf. Chafee (1920–1).
- 70 See generally Greenleaf (1842). The Preface to the sixteenth edition, by Wigmore, contains a brief account of Greenleaf and of the history of his work. See also the *Centennial History of the Harvard Law School, 1817–1917* (1918), 215–19; Sutherland (1967), 122–3, 137.
- 71 Greenleaf (1899), Preface.
- 72 Swift (1810).
- 73 Greenleaf (1842), Preface.
- 74 Taylor (1848), Preface.
- 75 J. B. Thayer (1927), 210.
- 76 11th edn (1920) (ed. J. B. Matthews and G. F. Spear).
- 77 Chafee (1920–1), 901.
- 78 Stallybrass (1933), 127.
- 79 Wigmore *Science*, 5n.

- 80 Preface. See also J. B. Thayer (1927), 323–4; 2 Wigmore *Treatise*, 687, n. 1; (1861–2) 12 *Law Magazine and Law Review* 44; (1895) 7 *The Green Bag* 510–16; D. M. Gold (1979). I am grateful to Chief Justice Vincent L. McKusick of Maine for information and references concerning his predecessor.
- 81 20 US Stat. at Large, 30.
- 82 For an excellent general account, see Radzinowicz (1957). See also L. Stephen (1895). See now K. J. M. Smith (1988).
- 83 J. F. Stephen (1876), Introduction, xxii. Cf. Fifoot (1959), 115–17.
- 84 L. Stephen (1895), 209–11; J. F. Stephen (1890), 206–7.
- 85 (1876), xxiii. See also L. Stephen (1895), 207–10.
- 86 J. F. Stephen (1863).
- 87 Radzinowicz (1957), 54–5; Fifoot (1959), 115.
- 88 J. F. Stephen (1872). The Introduction ran to 134 pages and, although somewhat discursive, remains one of the classic contributions to the theory of evidence. On the Indian Evidence Act, see Gledhill (1964), 241–5.
- 89 Sarkar (1971), 15.
- 90 L. Stephen (1895), 275.
- 91 *Ibid.*, 271–5.
- 92 See Elias (1962), 253n.; Sarkar (1971), Preface.
- 93 Sarkar (1971), ch. 1, quoting Bayley CJ in *Smith v Ludhia* 17.B, 129, 141.
- 94 Cited 1 Wigmore *Treatise* (3rd edn), Preface, xx.
- 95 Stephen (1876), xx.
- 96 Radzinowicz (1957), 9.
- 97 Stephen (1876), x.
- 98 Stephen (1876), Introduction.
- 99 Stephen (1876), xvii–xviii.
- 100 Thayer (1898), ch. 8.
- 101 Stephen's original account of relevancy was criticized by George Clifford Whitworth of the Bombay Civil Service in a pamphlet which I have not been able to trace. Whitworth's argument was discussed and developed by Pollock (1876). Pollock argued that it would not be appropriate to treat logical relevancy as part of the law of evidence for two reasons: first, it mixes up legal propositions with propositions which are common to all knowledge; secondly, that there was no consensus on the principles of logic: 'If the law of evidence is to embody the canons of inductive logic to the extent of Mr Whitworth's rules or Mr Stephen's ninth article, I do not see why it should stop short of giving a complete exposition of them, and landing us, perhaps in the thick of a purely metaphysical controversy on the true meaning of cause' (*ibid.*, 388). Thayer followed Pollock in treating relevance as a matter of logic which was presupposed by, but not part of, the law of evidence. Chamberlayne discusses the debate at length and concludes that 'No Particular Theory of Relevancy [is] Imposed on the Law of Evidence' (1 *Treatise*, s. 59). Stephen explicitly states that '[t]he logical theory was cleared up by Mill' (Stephen (1876), xii). Pollock and Chamberlayne recognized that there is more than one theory of logic. Unfortunately, at least until recently, most writers in the Rationalist Tradition have assumed Mill's account of induction uncritically. A major theme of the present work is that there are competing

- conceptions of rationality abroad in evidence discourse and that to understand the subject one cannot beg the metaphysical questions. Whether one classifies this as part of ‘the law of evidence’ for purposes of codification or exposition is another, secondary, issue (see below, ch. 6).
- 102 Stephen (1876), xi–xii. He continues: ‘The logical theory was cleared up by Mr Mill. Bentham and some other writers had more or less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my “Introduction to the Indian Evidence Act” to point out in detail the very close resemblance which exists between Mr Mill’s theory and the existing state of the law.’
- 103 Thayer (1898), ch. 11.
- 104 Stephen (1876), xiii.
- 105 Thayer (1898), ch. 11.
- 106 See esp. Stephen (1876), x–xvii.
- 107 For a detailed account of Thayer’s view of the Law of Evidence, see below, ch. 6. [See also, Swift (2000).]
- 108 On Thayer’s life, see especially the *Centennial History of the Harvard Law School*, 1817–1917 (1918). A fascinating interpretation is to be found in Chamberlayne (1908), 758–63.
- 109 Thayer (1898), 527.
- 110 Pollock (1899). Both Pollock and Thayer criticized Stephen for lacking a clear conception of admissibility, distinct from relevance on the one hand and materiality on the other.
- 111 Chamberlayne (1908), 760.
- 112 See esp. Morgan (1956).
- 113 See Thayer (1898), *passim*; (1927), 305–9.
- 114 Thayer (1898), 279n.
- 115 *Ibid.*, 535.
- 116 *Ibid.*, 314n.
- 117 *Ibid.*, 530.
- 118 A brief account is given in Maguire et al. (1973), Preface.
- 119 There is a 1980 supplement.
- 120 See Chamberlayne (1908). After the original version of the essay was published, I had access to a valuable unpublished paper by J. Hook, then a student at Harvard Law School, entitled ‘A Preliminary Treatise on Thayer’ (1986). This contains a good deal of interesting new material about Thayer’s intellectual background, associations and his political and religious beliefs. Hook emphasizes Thayer’s admiration of Maine, Emerson and the early pragmatists, some of whom he knew well. He also had a close association with the young Oliver Wendell Holmes Jr. Hook presents Thayer as a forerunner of legal realism; he was also committed to a particular form of intuitionist morality. This paper suggests that there is still scope for a full-scale intellectual biography of Thayer. I found the following passage particularly revealing:
- Thayer’s favourite maxim was: ‘The law of evidence is the creature of experience rather than logic.’ The most important reason, however, is based in Thayer’s fundamental sympathy with Jacksonian democracy and Emersonian intuitive

individualism. The official determination of matters which are essentially logical was a form of elitism. It suggests that local judges and jurors are not very intelligent. Thayer, who once appended a two page footnote on the origin of the fact that Americans are called citizens, and English subjects, to an innocent sentence in an article about Indians, was probably embarrassed by any appearance of elitism. Also, the idealist tendency, some of which Thayer received from Emerson, has always been to tie morality and logic together. Morality is not beaten into the child, but discovered by the child as his logic matures. Since Thayer was anxious to show that the law is a positive creation, not an expression of higher morality, it made sense for him to divorce logic from the law as well. (Hook (1986), 43)

The interpretation of Thayer's views of the Law of Evidence advanced in ch. 6 below is similar to Hook's, although the emphasis is different. [See also Swift (2000) on 'Thayer's triumph', arguing that Thayer's general approach has resulted in an excess of trial court discretion.]

- 121 McKelvey (1897). The 1924 edition was criticized by Morgan for doing little more than putting 'the new wine of current decisions . . . in the old bottle of his original text and thereby ruining the wine', (1924–5) 34 Yale LJ 223. A similar fate befell *Jones on Evidence* (1896), which was destined for most of its lifespan to be dwarfed by Wigmore. It is an example of an unpretentious but competent book which expanded from a compact textbook to a single-volume reference work for practitioners, to a four-volume reference work. Although its scope was extended to cover criminal evidence, the organization and content remained remarkably static, the main contribution of successive editors being to make minor verbal amendments to the text and to cram more and more cases into the footnotes.
- 122 See list of Abbreviations. On Wigmore generally see Roalfe (1977); *TEBW*, ch. 3; and the entry in Simpson (ed.) (1984a).
- 123 Beale (1905).
- 124 Morgan (1940).
- 125 See above, n. 122. For an interesting interpretation of Wigmore's political significance see Graham (1987), discussed below, 77–9.
- 126 Preface to the 1st edn.
- 127 Wigmore was more pragmatic about this than Thayer, and in the *Treatise* dealt with a number of topics which he acknowledged belonged to substantive law or procedure rather than the law of evidence.
- 128 See list of Abbreviations.
- 129 Wigmore *Science*, 1.
- 130 *Ibid.*, 5.
- 131 *Ibid.* On the relationship between the Science and the Trial Rules see *ibid.*, Appendix I and *TEBW*, 151–64 (cf. *Analysis* (2005) ch. 11).
- 132 See generally *TEBW*.
- 133 Note in Chamberlayne (1908).
- 134 *Ibid.* Chamberlayne is described in his *Treatise* as the 'American Editor of Best's *Principles of the Law of Evidence*, and American Editor of the International Edition of *Best on Evidence*, and the American Editor of *Taylor on Evidence*'.

- 135 Chamberlayne (1911–16) (hereafter, Chamberlayne *Treatise*), vol. I, *Administration*, 1911; vol. II, *Procedure*, 1911; vol. III, *Reasoning and Witnesses*, 0000; vol. IV, *Relevancy*, 1913; vol. V *Media of Proof*, 1916 (edited by Howard C. Joyce). The work was published by Matthew Bender, Albany, New York, and Sweet and Maxwell, London. On the unhappy publishing history of the last volumes, see below 68–9.
- 136 Chamberlayne’s general views and approach are conveniently summarized in his paper (1908). See also the Preface and Introduction to the first volume of his *Treatise*, (1906) 18 *Green Bag* 677, and *Trial Evidence* (1936).
- 137 Thayer (1898), 527, quoted above at 61.
- 138 Chamberlayne *Treatise*, n. 134, at 766–7.
- 139 *Ibid.*, 771–2. There seems to be less of a tension between the adversarial model and the aims of adjective law in Chamberlayne’s thought than in Bentham’s.
- 140 Chamberlayne 1 *Treatise*, Preface, xi.
- 141 *Ibid.*, s. 772. This section draws heavily on Salmond (1907).
- 142 Chamberlayne (1908), 773.
- 143 *Ibid.*, 759–60.
- 144 *Ibid.*, 773.
- 145 *Ibid.*, 761.
- 146 *Ibid.*, 762.
- 147 *Ibid.*, 772. Chamberlayne’s explicit ground for differing from Thayer and Wigmore relates to the role of precedent in the law of evidence – a theme, the importance of which is regularly underestimated in the literature; however, a more important implicit difference is ideological. Chamberlayne’s approach to precedent is usefully summarized as follows:

Perhaps the most fundamental difference is that I cannot concede the scientific propriety of applying the doctrine of *stare decisis* to the rules regulating the admissibility of evidence. I at once agree that there is a large element of substantive or positive law which is covertly or openly within the scope of the rules of evidence; and, as to this, I make no question as the right of an aggrieved party to carry an adverse ruling up to a higher court. But I feel convinced that the control of precedent should extend only to matters of the substantive rights or duties of the parties; and that the admissibility of evidence is not a question of substantive right, but an incident in the administration by the court of its judicial function for the doing of justice. In my view, the presiding judge has the administrative duty of protecting and enforcing the substantive rights of the parties; but that in connection with the trial of a disputed proposition of fact the substantive right of the party is practically limited to insisting upon the opportunity of trying to establish, by the most probative evidence at his command, the truth of his contention, and that the evidence in the case shall be received and weighed according to the rules prescribed by reason. So long as reason is followed, it is not, according to my view, part of the substantive right of a litigant to insist that it should be exercised in a particular way, merely because in the most closely analogous case such a ruling was made. In other words, the admissibility of evidence, so long as reason is applied, is a matter of administration. [*Ibid.*, 763; cf. 1 *Treatise*, s. 68.]

- 148 Ibid., 770–1; 1 *Treatise*, *passim*. Like Best and Appleton, Chamberlayne no doubt realized that it was impolitic to present himself as an unqualified Benthamite.
- 149 *TEBW*, 48.
- 150 Bentham, e.g. VI *Works*, 557–9; Chamberlayne (1908), 769; cf. 1 *Treatise*, Preface and chs. 6 and 7; on Bentham's attack on 'the fallacies of sentimental liberalism' see *TEBW*, 82–6.
- 151 One of Chamberlayne's list of defects of judicial administration is: 'the ability of the well-paid criminal lawyer to outwit the efforts of society to punish its law-breakers, of high or low degree or position, by laying traps for overworked judges on points of evidence, almost too fine for statement, and springing them in an appellate court, until outraged society sees its only hope for safety in the convenient branch of a tree . . .' (ibid., 759). There is no mention in this context of the risks of conviction of innocent suspects, but Chamberlayne called the presumption of innocence an 'overstated rule' and a 'pseudo-presumption' (2 *Treatise*, ss. 1172–5). Chamberlayne's treatment of the burden of proof in criminal cases, silence, the privilege against self-incrimination, and other matters of concern to civil libertarians are generally unsympathetic to the accused. For an examination of Bentham's views on the evils of wrongful conviction see *TEBW*, 95–100, where it is suggested that he can be criticized on both utilitarian and non-utilitarian grounds.
- 152 1 *Treatise*, s. 172, at 222.
- 153 Chamberlayne (1908), 764–5.
- 154 Chamberlayne had earlier been involved with litigation with the publishers of the *Cyclopedia of Law and Procedure* (1906) 'as to their right to publish his unfinished manuscript [an article on Evidence] without consent, and with addition of matter written by others; to the accuracy of which he was unable to agree' (note, 42 *American Law Review* 755, 756). He gained widespread support in his campaign during his lifetime, but lost out after his death.
- 155 The work had a mixed reception. For reviews of Chamberlayne see esp. (1911–12) 25 *Harv. L. Rev.* 483; (1913–14) 27 *Harv. L. Rev.* 601 (E. R. Thayer); (1913–14) 23 *Yale LJ*, 384 (Shulman); (1915–16) 1 *Cornell Law Quarterly* 14 (Wyckoff).
- 156 1 *Treatise*, ix.
- 157 Ibid.
- 158 Ibid., xiii.
- 159 Thayer (1898), 511–12.
- 160 E. R. Thayer (1913–14).
- 161 Shulman (1913–14).
- 162 C. C. Moore (1908), clxviii, 1612 (hereafter Moore *Treatise*).
- 163 C. C. Moore (1907).
- 164 Wills (1838); Ram (1861).
- 165 Moore *Treatise*, Preface.
- 166 Ibid., vi.
- 167 Discussed Twining (1973a), 60–7.
- 168 (1910) 14 *Law Notes* 35. Ironically the key-note quotation on the title page is from Bentham (1827), bk. i, ch. 9.

- 169 (1909–10) 8 Mich L Rev 80 (V. H. L.); see also (1909) 9 Col L Rev 570; 20 *Green Bag* 627 (Chamberlayne).
- 170 Wigmore (1909). This is one of the clearest passages in which Wigmore, while denying that there are rules of weight, acknowledges the value of the law reports as sources of general (or lawyers') experience. See *TEBW*, 154–5 and 236n.
- 171 Wigmore (1908b).
- 172 Wigmore *Science* (1937), 5, n. 1.
- 173 V. H. L. in 8 Mich. L. Rev. 80; cf. Thayer on Bentham, cited above.
- 174 See below, ch. 6.
- 175 This section is a slightly modified version of pp. 8–12 of *TEBW*: its purpose is to bring the story up to date without attempting a comprehensive overview.
- 176 Wigmore *Science*.
- 177 On McCormick see (1961) 40 *Texas Law Review* 176. Graham (1987) took me to task for calling McCormick's hornbook 'pedestrian' in *TEBW* and for overlooking the point that 'it was butchered by its revisors' (1208). The text indicates that I have revised my opinion on McCormick's intellect, but not on the point about the constraints imposed by commercial publishing pressures.
- 178 On the history of these codes, see Wright and Graham (1977), ss. 5001–7; Lempert and Saltzburg (1977), 1191–2000.
- 179 On Michael and Adler, see 1 Wigmore *Treatise* (Tillers rev., 1983), s. 371. Tillers suggests that Michael and Adler were indirectly influential through the writings on relevancy of Professors James, Trautman and Ball.
- 180 Michael and Adler also wrote a series of articles that were more influential: see especially (1934), (1952); also Michael (1948).
- 181 Wigmore *Science*, 6.
- 182 Apart from periodical literature, perhaps the most significant contributions were Nokes (1967), in my view an underrated work; Cowen and Carter (1956) and Williams (1963). The paucity of scholarly writing on Evidence in England is directly attributable to its relative neglect in the law curriculum in university degrees and The Law Society's examinations, which in turn is partly due to the absurd idea that Evidence is essentially a 'barrister's subject'.
- 183 A. R. N. (later Sir Rupert) Cross, *Evidence* (1st edn, 1958; 5th edn, 1979; the latest edition is by Colin Tapper, 1985). [Cross and Tapper (10th edn, 2004).]
- 184 Preface to the first edition (1958). Stephen's *Digest* was 'extremely condensed'; Cross refers to *Phipson on Evidence*, the leading practitioners' treatise which his work partly displaced as 'the repository of evidentiary law' (Cross (1958) Preface).
- 185 On Cross, see Hart (1984), 405–37; Tapper (ed.) (1981), esp. the Memorial Address by A. M. Honoré.
- 186 Cross was familiar with at least some of Bentham's writings on evidence; he cited Gulson (1923) in two places in the first edition. The fifth edition contains a few references to recent debates on probabilities and proof. On the misuse of Bentham by the Criminal Law Revision Committee, see [Twining (1973c) (ch. 10 of the first edition of this book)].
- 187 *TEBW*; 100–8. See now the Criminal Justice Act 1988.

- 188 [For a brief overview of developments in the English law of evidence since 1990, see below ch. 6 n. 29.]
- 189 Wright and Graham, (1977), 13.
- 190 See especially Perelman (1963); Perelman and Olbrechts-Tyteca (1971).
- 191 *People v Collins* 68 Cal. 2d. 319; 438 P. 2d. 33 (1968). A select bibliography on probabilities and proof is included in Twining (ed.) (1983), 156–7. [On the probability debates up to 1992, see Twining and Stein (1992), Part II. For developments since 1992, see *Analysis* (2005), ch. 9 and Appendix I. See further, Robertson and Vignaux (1995), Dawid (2002), (2005), Redmayne (2001) chs. 3 and 4, Roberts and Zuckerman (2004) at 116–32; on ‘Bayesian-Skepticism’ see Stein (1996), R. Friedman (1997) and Dawid (2005).]
- 192 Eggleston (1983); Barnes (1983); M. D. Finkelstein (1978).
- 193 Useful surveys are to be found in Tapp (1976, 1980); (1982) 17(1) *Law and Society Review*; Lloyd-Bostock and Clifford (1983); Saks and Hastie (1978); Lloyd-Bostock (1988a, 1988b). [Developments in Law and Psychology since 1990 are surveyed in Stephenson (1992), Bull and Carson (1995), Loftus and Doyle (1997), and Memon et al. (eds.) (2003).]
- 194 See below, ch. 6.
- 195 See *TEBW*, 100–8.
- 196 On the relationship between disagreements within and disagreements about these frameworks of assumptions see Postscript below, 84–5.
- 197 See Fuller (1978), 358.
- 198 Thayer (1898), 199 (cited above); cf. Thayer (1927), 307. Most claims to ‘rationality’ imply something more positive than a rejection of traditional ‘irrational’ modes of dispute-resolution.
- 199 I am grateful to Kenneth Casebeer for this suggestion.
- 200 [I am inclined to follow Haack (1993), (1998) in steering a course between correspondence and coherence theories (‘foundherentism’).]
- 201 This passage is adapted from 86 Mich L Rev 1531–2, where the point is developed further.
- 202 On the possible extension of the models to discourse about evidence and proof in civilian and socialist legal systems see below, 85–6.
- 203 On deviants see Postscript below, 81–2 and Tillers (1983) at 1018.
- 204 Model I allows for non-utilitarian views and for disagreements about the priorities between rectitude of decision and other values. It is, however, clearly instrumentalist and has the effect of anchoring debates on Benthamite territory.
- 205 Cf. Wright and Graham (1977), 147:
The Progressive proceduralists considered themselves pragmatists, rather than theoreticians, so they seldom troubled to develop their model in any systematic fashion. While the fundamental principles of the Progressive school are easily deduced from the works of its leading writers, modern critics attribute much of the weaknesses of the paradigm to this inattention to theory. They say the reason there has been so little successful empirical work on questions of procedure is due to a failure to develop any model of the procedural system other than a simple

- chronology of the steps in a lawsuit. In terms of evidence the failure to consider basic theory means that use is still made of a set of concepts evolved a hundred years ago as a method of categorizing the existing case law although they have little relevance to the issues that arise in modern litigation.
- 206 Several civilian proceduralists have suggested to me that the Rationalist Model fits civilian discourse even better than Anglo–American. This raises some interesting questions about the compatibility of Model I with adversarial proceedings. A good starting point for such an enquiry is the theoretical framework presented in Damaska (1986). See further Postscript below, 85–6.
- 207 [At least up to 1990. On scepticism, see below ch. 4.]
- 208 In addition to helpful discussions in seminars in several universities, I have found the following particularly stimulating: Weinberg (1984); Galligan (1988); J. Jackson (1988a, 1988b); A. Stein (1987, 1988a). And, in a different vein, the exchange between Graham, Tillers and myself in (1987) 85 Mich L Rev 1204; 86 Mich L Rev 768 (1988b); and 86 Mich L Rev 2901. [See also Nijboer, Callen and Kwak (eds.) (1993), Nijboer and Reintjes (eds.) (1997), Malsch and Nijboer (eds.) (1999), Paciocco (2001), Risinger (2004), and the New York conference (2003), discussed in ch. 15 below.]
- 209 See Weinberg (1984), 136–8, doubting, *inter alia*, whether Morgan accepted Bentham’s epistemology. Weinberg cites Frank *Courts on Trial* (1963 edn) in support of this. However, even some of Frank’s discussions of Morgan as a possible ‘fact-sceptic’ suggest that he was implicitly invoking the standards of aspirational rationalism in giving a ‘realist’ account of how trials are in fact conducted – see e.g. ‘Morgan commented *sadly*’ (Frank (1963) 102). Another possible candidate is some of the work of Weinstein (e.g. 1966). In playing the game of ‘spot-the-deviants’ from my historical hypothesis it is probably wiser to focus on particular texts rather than authors.
- 210 ‘Liberal legalism’, as used by critical legal writers, seems to be so broad as to encompass almost all Anglo–American legal thought in the past two centuries. ‘Benthamism’, while narrower, is also open to a variety of interpretations, on which see Twining (1988a), 1536–41. The question about the ideological and political significance of the Rationalist Tradition is nevertheless important.
- 211 I am particularly grateful to Professors J. Wroblewski and M. Taruffo for raising this issue. [See also Nijboer et al. (1993).]
- 212 On the theory of fictions, see R. Harrison (1983), *TEBW*; 52–64, and Postema (1983).
- 213 Glassford (1820).
- 214 Abu Hareira (1984, 1986). [See also MacCormick (2005) chs. 11 and 12.]
- 215 Below, chs. 4 and 10–12.
- 216 E.g. Peter Tillers and Bernard Jackson below, 241, 258 n. 113–4.
- 217 Wright and Graham (1977), 143–54; Graham (1983, 1987). Graham and I have many differences, but we are both agreed that his model of ‘Progressive Proceduralism’ fits a Benthamite version of the Rationalist Tradition almost exactly, the main differences being that my formulation also allows space for differing interpretations of Bentham and for non-utilitarian process values.
- 218 Wright and Graham (1977), 149.
- 219 Graham (1987), 1231–4.

- 220 Wright and Graham (1977).
- 221 Reconstructed from Graham's writings cited in n. 212.
- 222 Tillers (1988b); Twining (1988a). Graham misinterpreted my reconstruction of the Rationalist Tradition and my account of the theories of Bentham and Wigmore as evangelical promotion rather than as a relatively detached attempt to expound and clarify the nature of our received heritage of thought about evidence as a preliminary to considering critically to what extent and in what respects it requires rethinking.
- 223 Graham is correct in pointing to the sharp distinction made by Bentham between substantive and adjective law and some possible political implications of this (e.g. that adjective law should not be used to nullify or mitigate bad laws); see further *TEBW*; 80, 82–3, 94–5.
- 224 Damaska (1986); see further below ch. 6 and Stein (review) (1988a).
- 225 See below, 85–6.
- 226 Above, 76.
- 227 See below, 116–19.
- 228 Below, ch. 4. On the self-refuting nature of 'irrealism' see Twining (1988a), 1544–6.
- 229 On the parallels between debates on Criminal Evidence in England in the 1820s and 1970s, see Twining (1973b) at 10.
- 230 On the implications of the Charter on Canadian procedure see Schiff (1988) and N. Finkelstein and Rogers (1988). [See now Sopinka, Lederman, and Bryant (1999) and Sharpe, Swinton and Roach (2002).]
- 231 Below, 135–7.
- 232 See below, 125–30.
- 233 See e.g. L. J. Cohen (1983). See also (1980b) on medical diagnosis. See further (1988) 86 *Mich L Rev* 1528, n. 16.
- 234 Tribe (1971).
- 235 Below, 306–10.
- 236 See above, n. 206. This passage was prompted by discussions at a conference on semiotics and law at Messina, Sicily in 1987. See symposium in 2 *International Journal of Semiotics and Law* (1988–9).
- 237 Damaska (1986), *passim*.
- 238 See below, chs. 5 and 7.
- 239 Cover and Fiss (1979).
- 240 E.g. Thibaut and Walker (1975); cf. Landsman (1984).

Some Scepticism about Some Scepticisms*

Introduction

As dependent variable, the law is potentially a particularly vulnerable target for what Berger has termed the 'debunking motif inherent in sociological consciousness'. This is perhaps especially true of the criminal law and criminal justice systems, which offer the promise of a particularly rich harvest to the sociologist anxious to indulge his perennial preoccupation with irony, latent function and the overlap and interpenetration of vice and virtue. For here are to be found society's most solemn proscriptions of unrighteousness on the one hand, and on the other its most formal procedural prescriptions as to how to deal with it.

Colin Low¹

There is a sense in which we are all relativists of one kind or another. In order to distinguish between different kinds we need a map. The sceptical, debunking tendency which is said to make sociology 'particularly at home in the temper of the modern era',² also runs through much recent literature about legal processes. It is appropriate that the jurist who urged us most forcefully to study fact-finding in law, called his theory 'fact-scepticism' and devoted a whole book to the study of historical relativism.³ Jerome Frank is, of course, by no means unique. Rabelais's Bridlegoose throws dice to decide cases;⁴ some logicians point to the limited role of closed system logic in reasoning towards particular conclusions of fact;⁵ some doubt whether induction and paradiuction deserve to be classified as 'reasoning' at all;⁶ the recent debate about probabilities is set within a framework in which there is general agreement that mathematical probabilities have at best a very limited practical application in law;⁷ Eggleston, for example, points to the fallacies, logical jumps and pitfalls for the unwary that can be found in actual examples of practical reasoning in legal contexts.⁸ The main lessons of psychology also appear to be cautionary: memory is unreliable, perception is unreliable, honest witnesses are suggestible, bias is unavoidable, non-rational techniques of persuasion are potent, and so on.⁹ From the Left comes the steady chant that the whole system is repressive and that notions such as the rule of law, justice under the law, and rights of the accused are a facade, part of a mystifying ideology which masks a very different reality.¹⁰ From the Right comes the equally steady chant that many traditional safeguards of individuals, such as the right to silence and the jury, are irrational sacred cows.¹¹ As is suggested in the

quotation from Colin Low, much recent research on criminal justice – not only by sociologists – has been dominated by a debunking motif. Many of the exposes are familiar: for example, legal process as a degradation ceremony,¹² defence lawyers as double agents,¹³ the arcane role of the judiciary in plea-bargaining,¹⁴ the myth of the so-called ‘helping’ professions,¹⁵ and the essentially routine, bureaucratic and cooperative nature of allegedly ‘adversary’ proceedings.¹⁶

Some of these ideas are not new; epistemological scepticism and relativism (the latter has had a strong recent resurgence in, for example, phenomenology) are as old as philosophy itself. The notions of a forensic lottery, of gaps between aspiration and reality, between law in books and law in action, and between theory and practice, are perennial themes within legal discourse. Recently there has been more talk of obfuscation, demystification and grim realities hidden behind ‘official views’. Current legal scholarship and public debate have been going through a fairly robust phase in which not only are alleged versions of ‘common sense’ and ‘the official view’ under regular attack, but strongly held beliefs of civil libertarians and of the Left have also been challenged intellectually as well as politically.

These trends in literature about legal processes, especially on the criminal side, seem very different from the optimistic and complacent rationalism of the mainstream of Anglo–American evidence scholarship.¹⁷ I argued in the last chapter that nearly all specialized Anglo–American literature about evidence – both theoretical and expository – has been remarkably homogeneous and narrowly focused.¹⁸ To put the matter simply: nearly all Anglo–American scholars and theorists of evidence, from Gilbert’s *The Law of Evidence* (1754), through Bentham, Stephen, Thayer and Wigmore, to the writings of Sir Rupert Cross, have broadly shared a common set of assumptions or postulates about the nature and purpose of adjudication and what is involved in proving allegations of fact in forensic contexts.¹⁹ We are, therefore, justified in talking of a single Rationalist Tradition of Evidence scholarship that by and large shares a common perspective that can be characterized as *optimistic rationalism*.²⁰

This contrast between the unsceptical assumptions of the central tradition of Evidence scholarship and the sceptical tone of much modern writing about legal processes is puzzling. Of course, it is hardly surprising that the ideas of Hegel and Darwin, of Freud and Marx, of Nietzsche and Schutz, should find some echoes in legal thought after a predictable intellectual lag.²¹ Nor is it surprising that such echoes should vary in volume and content, if rather less in tone. And why should it seem strange to find what might be interpreted as an enclave of bourgeois legal liberalism, or an untouched relic of Enlightenment optimism, co-existing with the confused uncertainties of a later era? Is this too not just a reflection of our general culture in which *Waiting for Godot* can be sandwiched between a chat show and a book at bedtime? A continuous bombardment of seemingly contradictory messages is what one expects of our modern Babel.

For the scholar trying to make sense of his intellectual environment just to accept, even relish, such diversity is not enough. One must still strive for coherence. Also,

some of the contrasts seem too neat: Marxist demystification versus liberal obfuscation or ‘contradiction’;²² modern sophistication versus Lockean common sense; pessimistic scepticism versus optimistic rationalism; students of judicial process versus evidence scholars. Some of these dichotomies just do not fit the facts; none does justice to complex cross-currents. The student of evidence who is concerned to feel his way towards a new alignment for the subject must come to terms with this confusing scene. The apparent contrast between mainstream evidence scholarship and the more diverse literature on judicial processes at least raises some questions: Is a direct challenge being presented to any of the key assumptions of the Rationalist Tradition? If so, at what points and with what implications? Are modern versions of scepticism and relativism merely a matter of mood and tone and rhetoric, masking some residues of common sense rationalism? Or are Reason, Truth and Justice seen as outdated illusions of a past age that have no place in a sophisticated and enlightened perspective on legal processes? Does contemporary thought mandate relativist or irrationalist theories of evidence? What would such theories look like?²³

This essay grew out of such concerns. It is the product of a first attempt to impose some order on a vast and confusing landscape. As such it claims to be little more than a report on a preliminary exploration of a few selected scenes of modern intellectual life. The result will be a preliminary sketch rather than a comprehensive map. Clarification of standpoint is important for such a venture.²⁴ In this essay I shall adopt the posture of a Thursday Sceptic, that is to say one who most of the time believes that the chair he is sitting on exists in a real world, that reason and persuasion are to be valued, and that a scholar should at least strive for relative detachment – but who is beset by doubts at a number of levels, most often, but not entirely regularly, between 2 a.m. and 4 a.m. on some Thursdays.

This is not just an ironic ploy. The Thursday Sceptic acknowledges that it is notoriously difficult consistently to sustain a genuinely sceptical position. Like lying and truth-telling, scepticism is hard work.²⁵ Belief is at least as insidious as doubt. The Thursday Sceptic tends to look quizzically at all claims to scepticism, including his own. He recognizes that doubt can operate at many levels; that in so complex and fallible an area as litigation the conditions of doubt are many and potent;²⁶ and that a single kind or condition of doubt may have wide ramifications. As Berger acknowledges, the law is particularly vulnerable as a target for debunking. For present purposes Thursday scepticism may be more than enough.

So far I have used the terms ‘scepticism’ and ‘relativism’ generically to encompass a wide range of positions in which confident or widely accepted views are made the subject of doubt.²⁷ From now on we need to be rather more discriminating, but it is important to cast the net widely for the reasons stated in the last paragraph. There are many varieties of scepticism. For example, philosophical scepticism typically refers to fundamental doubts about the *possibility* of knowledge or of reason or of objective values; religious scepticism involves doubt or disbelief about the tenets of some or all religions or about the existence of God; ‘scepticism’ may also refer

either to a generally sceptical attitude or to doubt about the possibility of any kind of knowledge or about some specific branch of knowledge or about some particular assertion or supposed fact or about something else. Accordingly, it is always important to ask: sceptical *about what*? Sceptics can be tough-minded or tender-minded, sincere or insincere, genuine or spurious. There are also degrees of doubt ranging from clear disbelief (e.g. the atheist), to agnosticism, to doubt (which may include the doubts of a true believer on the way to achieving faith), to mere questioning, however open-minded, of some belief or assumption which is commonly taken for granted. Accordingly it is important to ask: *how* sceptical? ‘Scepticism’ may apply, *inter alia*, to dispositions, to attitudes, to style or tone or demeanour, to methods or to a proposition or belief. For the most part we are here concerned with sceptical positions or beliefs which can be expressed as propositions. The Thursday Sceptic, dubious of all claims to scepticism, always asks: who is being how sceptical, about what, in what context(s), and for how long?

For the most part I shall concentrate on fairly familiar general forms of scepticism, such as philosophical scepticism and historical relativism, and typically in their stronger versions. I shall be particularly concerned to differentiate between very broad sceptical claims (as exemplified by epistemological scepticism or doubts about the reachability of fact in any legal system) and claims which turn out on examination to be about something much more specific (such as a doubt about the actual operation of a particular institution in a particular system).

This chapter, then, is a preliminary attempt to explore in general terms what bearing, if any, some apparently sceptical approaches have on the study of evidence and proof in adjudication. The central question addressed is how far the central underlying assumptions of the predominant Anglo–American tradition of theorizing, writing and debating about evidentiary issues are challenged by one or more varieties of scepticism or relativism so as to undermine the very notion that studying such matters as the reliability of testimony, the logic of proof or the efficiency of fact-finding institutions is both feasible and worth while.²⁸

The proposed itinerary is as follows: after a preliminary inspection of four kinds of trivial or spurious scepticism, we shall look briefly and in general terms at five related ‘strategies of scepticism’ and their possible bearings on a theory of evidence. First, philosophical scepticism with particular reference to the theory of knowledge as discussed by A. J. Ayer. Next historical relativism, as exemplified by the Americans Carl Becker and Charles Beard, who in turn influenced the leading protagonist of ‘fact-scepticism’ in law, Jerome Frank. Our fourth stop will be phenomenology, as exemplified by Berger and Luckmann’s *The Social Construction of Reality* and some recent applications of ‘constructionist perspectives’ to law. Next, we shall observe the implications of the position of some mathematicians in the current debate on the nature of reasoning about probabilities in forensic contexts. This leads on to a consideration of how far emphasis on differentiation of standpoint in legal discourse involves commitment to some kind of ‘relativism’. In the last section I shall consider what general lessons might be drawn from this survey and what implications they

may have for developing a ‘modern’ theory of evidence and proof in adjudication that belongs to a broadened conception of the discipline of law, which in turn still draws its theoretical inspiration largely from late nineteenth century thought and its heirs.

Exposition

Spurious scepticism and artificial polemics

False polemics feature prominently in the Great Juristic Bazaar.²⁹ Indeterminate attribution, ismatizing, Aunt Sallyism, non-joinder of issue and the repetitious exaggeration of minute differences are all familiar features of juristic debate.³⁰ In searching for serious challenges to the Rationalist Tradition we need to be particularly wary of becoming involved in artificial polemics prompted by spurious or trivial scepticism – that is to say versions of purported ‘scepticism’ or ‘relativism’ that are not worth taking seriously. These are sufficiently common that it is worth identifying and disposing of four characters who present little threat to the Rationalist Tradition. Let us call them the Sophomore, the Disappointed Perfectionist, the Caricaturist and the Hardnosed Practitioner.

The ‘sceptical’ Sophomore is familiar to teachers of philosophy. This is the student who poses or misposes an important philosophical question and then either refuses to play the philosophical game or is merely playing some trivial game of his or her own or gets caught in an infinite regress or commits some elementary fallacy, such as begging the question or assuming what has to be proved. Trivial, self-contradictory or otherwise fallacious sceptical noises are common in legal discourse, but they present no serious intellectual threat to the Rationalist Tradition.

Another kind of spurious scepticism that is particularly prevalent in jurisprudential debate is the alleged scepticism of the Disappointed Perfectionist (or Absolutist). H. L. A. Hart in *The Concept of Law* identifies this as one of the factors behind ‘rule-scepticism’, which he defines as ‘the claim that talk of rules is a myth’:

The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all that they would be in a formalist’s heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open-texture was not a necessary feature of rules. The sceptic’s conception of what it is for a rule to exist may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.³¹

This passage has a double significance: it usefully identifies a tendency to exaggeration which is endemic in juristic debate, in this case scepticism about an unattainable ideal to which few, if any, subscribe. It also illustrates the related tendency of caricaturing what one is criticizing by attributing absolutist views to one’s opponents, for it is difficult to find a serious jurist who held the views attributed to rule-scepticism by Hart.³²

The Disappointed Perfectionist and the Caricaturist are often united in one person in polemical jurisprudence.³³ Attributing extreme views to one's opponents and then rushing to the other extreme is a familiar pattern of juristic discourse: because complete certainty is unattainable in law, it follows that law is totally unpredictable; because no human being can be completely neutral or impartial, it follows that all judges are biased. Such *non-sequiturs* are easily spotted when stated explicitly. Typically they are merely assumed or suggested by innuendo. A useful, but often misunderstood, corrective is Karl Llewellyn's robust maxim: "And-not" is bad Jurisprudence'.³⁴ Here it is pertinent to look for such tendencies in the context of seemingly sceptical attacks on alleged 'official' or 'common sense' or 'orthodox' views in respect of fact-finding in adjudicative processes. A good example is Jerome Frank's attack on the 'myth of certainty'.³⁵ Of course, the rhetoric of aspiration and unthinking assumptions in the ordinary discourse of laymen and of lawyers can provide numerous examples of loose talk of 'certainty' both in respect of rules and, less commonly perhaps, in respect of fact-finding. But, one may ask, if 'certainty' is interpreted strictly to mean a probability of 1 (as in the doctrine of chances), who believes in certainty in fact-finding? Is 'the myth of certainty' a worthwhile target to attack? In respect of fact-finding it is surely a caricature to equate 'the myth of certainty' with 'the official view'. It is widely and openly acknowledged that evidentiary issues are to be conceived in terms of relative probabilities rather than certainties. The standards of proof 'beyond reasonable doubt' and 'on the balance of probabilities' explicitly set standards below 'certainty' in this literal sense. The elaborate paraphernalia of doctrines concerning the burden of proof and presumptions can plausibly be interpreted as fairly sophisticated guides to decision in situations of *uncertainty*. The provision of safeguards and appeals is an acknowledgement of the general possibility of mistakes, even though officialdom often finds it difficult openly to admit to mistakes in particular cases. It is disingenuous to interpret terms like 'certainty' literally when they are used as part of the rhetoric of aspiration.³⁶

The 'ideal type' of a 'rational' approach to evidence does not postulate a set of impossible ideals. Rather it should be seen as an attempt to articulate some of the standard working assumptions of an intellectual tradition that was strongly oriented to the needs, attitudes and views of practising lawyers and judges. As such one might expect their views to be just as liable to attack for being simple-minded, insincere and unduly pragmatic as for being hopelessly idealistic or naive. We shall return to this in connection with the Hard-nosed Practitioner.

It is important to emphasize the qualified nature of the central assumptions of this ideal type; it is equally important to identify the unsceptical core: rectitude of decision is seen as the primary end of adjudication, as a necessary means to enforcement of law and vindication of rights (expletive justice); expletive justice is an important, if not necessarily an overriding, social value; the concept of 'rectitude of decision' leads directly to such notions as truth, facts, relevance, evidence, and inference and to a number of assumptions about the possibility of knowledge (or at least of warranted conclusions of fact) and about valid reasoning. Thus there are

plenty of points of potential disagreement and difference between adherents of this model and others without our having to waste time on caricatures or unattainable ideals.

The Hard-nosed Practitioner is less easily dismissed. This is the professional who makes such statements as 'I am not concerned with justice or truth, my aim is to win cases' or 'The adversary trial is a game' or 'My task is to persuade, not to reason'. After one has made due allowance for rhetorical exaggeration and false contrasts (e.g. the assumption that justice and winning are mutually incompatible), there may still be some substantial points that survive: there is often a conflict between winning and truth-seeking from the standpoint of the advocate in adversary proceedings; those features of some trials that make them like some games may be subversive of rationalist aspirations; non-rational means of persuasion may sometimes or often be more effective than reasoned argument.³⁷ It is difficult to know how to interpret such simplistic assertions. Is an emphasis on winning to be taken as merely indicating a tension within the adversary process, or does it indicate a rejection of the stated values of the system or a cynicism about anti-claims to such values or what? Is pointing to the operation of non-rational factors in adjudicative fact-finding, such as the attractiveness of one's client or the appeal of one's body language, to be taken as a denial of the value or feasibility of rationality? The difficulty about such statements is not that they are necessarily untrue or insincere, it is rather that their precise meaning and status are unclear. Before their validity and significance can be assessed for present purposes they need to be restated in a form that is less vague and less ambiguous. In short, the folk-wisdom of the Hard-nosed Practitioner needs to be academicized. This has been done to some of the standard examples. The notion of the trial as a game, the ethical dilemmas of advocacy, the tensions between winning and truth have been canvassed in the academic literature. Some of them will reappear in a different form later in this essay.

There is, however, an alternative interpretation of standard pragmatic disclaimers – commonplace in treatises and the law reports – that the law is not concerned with ultimate questions about philosophical concepts of truth and proof. In this view, the law proceeds as if there is a real world, accessible to the human mind, and that the truth of statements can be tested by evidence. Just as for some purposes we treat 'the facts' of a case or 'stipulated facts' in litigation as if they are true, even if we are not sure or do not know or even believe them to be false, so, it might be argued, the assumptions of the Rationalist Tradition are pragmatic working hypotheses which all participants, including treatise writers, accept as if they were so, irrespective of their personal beliefs. Thus a scholar in the Rationalist Tradition, as well as a practitioner or judge, might be a genuine philosophical sceptic (about knowledge or rationality or ethics or all three) and yet, in order to participate in legal processes, adopts unsceptical premises as pragmatic working hypotheses.³⁸

To dismiss some sceptics as disappointed absolutists or as caricaturists should not be taken as a sign of complacency about our legal institutions or about the human condition. Nor is it a plea for consensus. The object is to clear the ground of

rhetoric and artificial polemics in order to clarify what may be in issue in serious non-rhetorical debates. The Disappointed Perfectionist typically ends up in a position as absurd and untenable as the one from which he reacted. The Caricaturist typically fails to join issue at all. There is enough room for disagreement and doubt among reasonable and informed people in the areas under discussion for there to be no need for the artificial polemics of traditional jurisprudence nor untenable forms of extremism.

Philosophical scepticism

The contrast between the unsceptical assumptions of the Rationalist Tradition and the sceptical tone of much recent writing about judicial processes needs to be clarified at a number of levels. In this section I shall try to suggest some points of contact between the central assumptions of the Rationalist Tradition and the persistent phenomenon of scepticism in philosophy by reference to A. J. Ayer's treatment of scepticism in *The Problem of Knowledge*.³⁹ Later I shall consider whether any of the writers being surveyed might count as philosophical sceptics of one kind or another in a strong sense. Once again, the object is to map possible points of contact rather than to explore complex issues in depth.

For present purposes it is useful to distinguish three broadly different kinds of philosophical scepticism. First, epistemological scepticism which denies the possibility of any kind of knowledge; secondly, ethical scepticism, or subjectivism, which holds that judgements of value are merely a matter of individual preference or are entirely relative to time or place or circumstance; and, thirdly, irrationalism, in the sense of scepticism about all claims to the possibility of objectively valid reasoning or, as Peter Unger puts it, 'the thesis that no one is ever *justified* or at all *reasonable* in anything'.⁴⁰

There are, of course, many varieties within these broad categories and complex relations between them. In order to keep the presentations simple, I shall focus on strong or extreme forms of each variety – the denial that *any* knowledge is *possible*; the claim that all judgements of value are *solely* a matter of individual preference, not susceptible to rational appraisal or justification; and the denial of the *possibility* of valid reasoning. I shall concentrate on epistemological scepticism and scepticism about one kind of reasoning, induction, as these have the most direct and obvious connections with the assumptions of the Rationalist Tradition.

A theory of Evidence, Proof and Fact-finding (hereafter EPF) is a middle order theory. The philosopher of knowledge is concerned with ultimate questions about the possibility and the nature of knowledge in general. The historiographer is concerned with the specific nature of historical knowledge and the standards and methods of proof or the canons of evidence on which such 'knowledge' is allegedly based. The theorist of evidence is, in a sense, concerned with 'legal knowledge of past facts'.⁴¹ The philosophical sceptic who questions the possibility of any kind of knowledge, thereby questions the possibility of both historical and legal knowledge. A theory of history or a theory of EPF which takes the possibility of historical knowledge or legal

knowledge as a given presupposes some theory of knowledge. Thus epistemological scepticism offers a direct challenge to such a theory.

‘It is now often said that philosophical scepticism is not serious, and there is a sense in which this is true’, writes Ayer at the start of an essay on the subject.⁴² This statement is not as dismissive as at first sight may appear. For Ayer’s approach to the problem of knowledge is based on taking the arguments of scepticism seriously. He suggests that the pattern of a sceptic’s argument is essentially the same when he casts doubt on the validity of our belief in the existence of physical objects or of scientific entities or of the minds of others or of the past or on the validity of inductive reasoning.⁴³ The sceptic uses an argument which seeks to show that the belief in each case depends upon an illegitimate inference.⁴⁴ The applications to each particular kind of belief are different, showing that the justifications for each may stand on different levels, but the pattern is the same: ‘The first step is to insist that we depend entirely on the premises for our knowledge of the conclusion; . . . the second step . . . is to show that the relation of premises and conclusion is not deductive . . .’ The third step is to show that these inferences are not inductive either, even if inductive inference is legitimate at all; ‘[t]he last step is to argue that since these inferences cannot be justified either deductively or inductively they cannot be justified at all.’⁴⁵ Ayer continues:

The problem which is presented in all these cases is that of establishing our right to make what appears to be a special sort of advance beyond our data . . . For those who wish to vindicate our claim to knowledge. The difficulty is to find a way of bridging or abolishing this gap.

Concern with the theory of knowledge is very much a matter of taking this difficulty seriously. The different ways of trying to meet it mark out different schools of philosophy or different methods of attacking philosophical questions. Apart from the purely sceptical position, which sets the problem, there are four main lines of approach. It is interesting that each of them consists in denying a different step in the sceptic’s argument.⁴⁶

Thus, according to Ayer, the Naive Realist denies the first step; the Reductionist denies the second; the Scientific Approach denies the third; and the method of Descriptive Analysis, favoured by Ayer, denies the fourth. ‘Here one does not contest the premises of the sceptic’s argument, but only its conclusion . . . we can give an account of the procedures that we actually follow. But no justification of these procedures is necessary or possible.’⁴⁷ The sceptic’s conclusion is not acceptable because ‘it is by insisting on an impossible standard of perfection, that the sceptic makes himself secure.’⁴⁸ Ayer’s argument, then, is that the philosophical sceptic’s *arguments* should be taken seriously, for refuting them is central to a theory of knowledge, but his conclusion should not.⁴⁹

Ayer’s approach to the problem of knowledge is useful for present purposes for a number of reasons. First, it suggests that we should question whether particular allegedly sceptical or relativist positions need to be taken seriously at the level of

philosophy. Or, to put the matter differently, not all sceptics are *philosophical sceptics* in Ayer's sense. Later I shall try to show that few, if any, of the 'strategies of scepticism' considered in this essay necessarily involve rejection of a cognitivist position.

Secondly, Ayer's account provides a useful way of mapping the relationship of a wide variety of different theories and approaches to the problem of knowledge on the one hand and to a theory of EPF on the other. We can identify two immediate points of contact between a theory of EPF and philosophical scepticism. According to the orthodox view fact-determination in adjudicative processes is typically, but not exclusively, concerned with ascertaining the truth about *particular* past events.⁵⁰ In this respect it is closely analogous to historical enquiry. Thus a possible direct connection is established with both historical relativism and with scepticism about the possibility of historical knowledge. Furthermore, there seems to be a general consensus among theorists of evidence that the mode of argumentation appropriate to proof in legal contexts is induction, as it is found in everyday practical reasoning.⁵¹ Thus scepticism about the possibility of induction and theories of induction is also directly relevant to a theory of EPF. Conversely questions about the existence of physical objects or of other minds or scientific laws, although they may have particular applications in legal contexts, seem at first sight to be less generally relevant to a theory of EPF.

Thirdly, Ayer's account suggests another important link between the philosophy of knowledge and theories of evidence. Concepts such as 'fact', 'truth', 'objectivity', 'proof', 'inference', 'probability', 'canons of evidence', and 'induction' are important, in some cases central, concepts in epistemology as they are in the legal literature on evidence. At the very least this suggests a possibility of cross-fertilization between two bodies of literature that have developed largely independently of each other in modern times. Indeed, it is fair to say that epistemology has been very largely neglected by Anglo-American legal philosophers.

Finally, there is a direct historical connection between Ayer's approach and the central intellectual tradition of theorizing about evidence in the Anglo-American context. For they are both out of the same philosophical stable – English empiricism. Bentham's epistemology, which was only partially developed, is directly traceable to the tradition of Bacon, Locke and Hume, but without Hume's fundamental scepticism.⁵² Mill built on Bentham and nearly all subsequent English-speaking writers on Evidence, such as Stephen, Wigmore, Michael and Adler,⁵³ and Cross built on Bentham and Mill. Ayer, as a theorist of knowledge, is perhaps the leading contemporary critic of Humean scepticism among English analytical philosophers. Not all Anglo-American evidence scholars have shared identical epistemological assumptions, but it is fair to say that none was a philosophical sceptic and that most, like Ayer, can be located within the general tradition of English empiricism.

It is not true to say that philosophical scepticism is dead. Indeed, Anglo-American philosophers pay tribute to its persistence both explicitly and, more important, implicitly by treating it as their main target of attack. There are, however, surprisingly few leading philosophers who accept the label of 'sceptic' in any strong sense of

the term – the Norwegian philosopher Arne Naess is perhaps the most important exception.⁵⁴ Instead there is a widespread, but not universal, consensus among contemporary Anglo–American philosophers that philosophical scepticism – as exemplified by Sextus Empiricus and Hume – is unacceptable, but that there are some important elements of truth in scepticism that account for its tenacity. In this view, ‘the sceptic has won many battles . . . [but] has lost the war’.⁵⁵ Nicholas Rescher, a prominent exponent of this view, summarizes the alleged core of truth in scepticism as follows:

To begin with, the sceptic is quite right on the issue of the demanding absolutism of knowledge. When something is claimed as known it is indeed thereby claimed to be certain, exact, incorrigible, etc. And this absolutism – however ‘realistically’ construed – makes the substantiation of knowledge claims a relatively demanding enterprise. (To be sure, the sceptic is wrong to inflate these difficulties into impossibilities, construing the absolutes at issue in an unrealistic and hyperbolic sense which quite improperly loads the argument decisively in his favour from the very outset.) Again, the sceptic is right in his assault against foundationalism and the idea of absolutely certain irrefragible premisses on which the whole structure of objective factual knowledge can be erected. He is right in contending that insofar as such absolutely secure data are available to us through the phenomenal certainties of immediate experience, they cannot yield *objective* knowledge. Moreover, the sceptic is right in his insistence on the ‘evidential gap’ as a fact of life that assures the theoretical fallibility of all objective factual claims. These must – in view of their very objectivity – inevitably be such that their assertive content transcends the supportive data we can ever secure on their behalf. The sceptic is also right in holding that what we vaunt as our ‘scientific knowledge’ must always be conceived of as containing a substantial admixture of error. (To be sure, scepticism goes too far in construing such a concession of fallibility as to destroy any and all prospects of the realization of knowledge.) Finally, the sceptic is right that we cannot claim the completeness or the correctness and indeed not even the consistency of our knowledge of the world . . .

The concession that ‘the body of our knowledge’ contains various errors and deficiencies does not make it in order to withdraw each and every one of the particular claims to knowledge that lie within its precincts.

Yet the sceptic has certainly not struggled in vain. Much essential clarification of the nature of knowledge can only be attained by analysing how the key arguments deployed by the sceptic fail in the final analysis to establish his governing conclusion of the illegitimacy of claims to knowledge. What the sceptic’s argumentation has managed to achieve is not to establish the unattainability of knowledge but to exhibit the inherent limitations of such knowledge as we can properly lay claim to. In this way, the sceptic has – no doubt to his own discomfiture – rendered a highly useful and constructive service to the cognitivist position.⁵⁶

The cognitivist is unsceptical only about the *possibility* of knowledge; it is entirely consistent with this position to be highly sceptical about particular claims to knowledge, about complacent claims for the efficiency of particular institutions,

procedures and techniques as instruments for discovering the truth or about any of 'the subsidiary issues regarding the inadequacy of our knowledge'.⁵⁷ Indeed, the thoughtful cognitivist should be particularly aware of the difficulties in practice of satisfying his own standards of 'knowledge'. The philosophical cognitivist is both entitled and well-qualified to adopt sceptical stances on many specific issues.

It should be reasonably clear that the premisses of the Rationalist Tradition are generally incompatible with each of these kinds of philosophical scepticism, at least in their more extreme forms. To put the matter very simply: the mainstream of Evidence scholarship has been cognitivist, in that it has assumed the possibility of warranted knowledge about the external world, its leading exponents have either been utilitarians or non-utilitarian deontologists who have accepted, and argued for, such values as expetive justice, the pursuit of truth, the preservation of the family, due process and the avoidance of vexation. The core assumption of the tradition is that adjudicative decisions on questions of fact should be based on evidence and argument, typically induction. In short, we try to arrive at warranted judgements about the truth of allegations of fact on the basis of rational evaluation and analysis of evidence in order to further the ends of justice and/or utility.

It is not my purpose in this paper to attack or defend a cognitivist position. Rather, I wish to suggest three points. First, that the leading Anglo-American theorists of Evidence are all cognitivists in the tradition of British empiricism. Secondly, that cognitivists have made a number of important concessions to sceptical arguments and some of these have potential implications for any theory of EPF. Finally, that genuine *philosophical* sceptics are rather rare birds today and, in the context of law, we should examine carefully the credentials of those who make such a claim. In the following sections I shall question *en passant* whether any of the sceptics or relativists under consideration deserve to be treated seriously as sceptics in respect of their basic epistemological or other philosophical assumptions.

Historical relativism

Modern historical relativism is generally associated with a reaction by historians and philosophers against some of the claims of the nineteenth-century objectivist school of historiography.⁵⁸ The latter is often exemplified or caricatured by the dictum of Leopold von Ranke that the aim of the historian is to describe things '*Wie es eigentlich gewesen*' ('exactly as they happened').⁵⁹ Leading proponents of this version of historical relativism – there are, of course, many varieties – included Croce, Mannheim, Collingwood and E. H. Carr. Each of these had different concerns and developed distinct positions, but all of them sought to disassociate themselves from 'extreme relativism'.

In the United States the leaders of historical relativism in the early twentieth century were James Harvey Robinson, Carl Becker and Charles Beard. It is useful for present purposes to look specifically at Becker and Beard, for it is they who have the most direct historical connection with scepticism in law. Becker and Beard were important figures in the general intellectual revolt against formalism in the United States, associated with Holmes, Dewey, William James, Peirce and Thorstein

Veblen.⁶⁰ Charles Beard's *An Economic Interpretation of the Constitution* (1913) stimulated interest and controversy among lawyers as well as historians. More directly Carl Becker, who was primarily an historian of ideas, was one of the sources of inspiration of Jerome Frank.⁶¹

Becker and Beard were unusual among American historians of the time in trying to develop theories of historiography.⁶² Each stuck his neck out in his Presidential address to the American Historical Association (Becker, 1926; Beard, 1933). I shall follow the example of other commentators in treating these as convenient summaries of their respective views.⁶³ Becker's is the more carefully considered statement; Beard's, being more vulnerable, has attracted more critical attention. Although both men were influenced by and contributed to the climate of opinion (one of Becker's favourite phrases) of the revolt against formalism, their theoretical ideas were more in tune with European writers, such as Nietzsche, Croce and Pirenne from whom – Morton White acidly suggests – they derived most of their confusions.⁶⁴

Becker's explicit target was all forms of 'objectivist' history – including Ranke, Foustel de Coulanges, and Acton's claims for the *Cambridge Modern History*.⁶⁵ But his historical scepticism was rooted in more general concerns. In his presidential address he asked three questions: '(1) What is the historical fact? (2) Where is the historical fact? (3) When is the historical fact?'⁶⁶

Becker acknowledges that 'simple facts', such as the statement 'In the year 49 BC Caesar crossed the Rubicon' or 'Indulgences were sold in Germany in 1517', 'can be proved down to the ground'.⁶⁷ He does not doubt that such facts are 'hard', 'objective', not susceptible to reasonable doubt. He is not, in short, a philosophical sceptic in Ayer's sense. But, he asks, are such facts as simple as they seem? And are they, on their own, historical facts? The answer to each of these questions is negative:

... a thousand and one lesser 'acts' went to make up the one simple fact that Caesar crossed the Rubicon; and if we had someone, say James Joyce, to know and relate all these facts, it would no doubt require a book of 794 pages to present this one fact that Caesar crossed the Rubicon. Thus the simple fact turns out to be not a simple fact at all. It is the statement that is simple – a simple generalisation from a thousand and one facts.⁶⁸

Becker's argument can perhaps be restated as follows: history is necessarily incomplete; even the statement of a 'simple fact' involves *selection*⁶⁹ and the task of the historian is to give meaning and significance to past facts. The picture of his task as merely piling up 'hard facts' for someone else to use is accordingly trebly misleading: *selection* is involved both in formulating statements of past facts and in deciding what statements to include; the idea of 'history' also involves *interpretation* and *arrangement*. Accordingly, 'the historian cannot eliminate the personal equation'.⁷⁰

Becker's emphasis on selection, interpretation and arrangement is typical of most relativist writings. His answers to the idiosyncratically expressed questions: 'Where is the historical fact?' and 'When is the historical fact?' have been more controversial. By drawing a sharp distinction, which has been much criticized,

between past events and statements about past events, he is able to say that 'the historical fact is in someone's mind or is nowhere . . . We say that it *was* an actual event, but is *now* an historical fact.'⁷¹ It follows that historical facts are part of the present. These statements have been criticized as being a misleading way of stating and explaining the truism that history is rewritten in every generation. As a description this is obscure; as an explanation it is inadequate; it is obscure about the exact nature of the relations between historical statements and actual past events; and it begs the question whether there are acceptable criteria for evaluating and criticizing particular historical statements.⁷²

Charles Beard's account of the writing of history is similar in spirit and tone to Becker's, but the arguments he uses are rather different. Like Becker he emphasizes the necessity for selection, interpretation and ordering and he emphasizes 'that any written history inevitably reflects the thought of the author in his time and cultural setting'.⁷³ He distinguishes between history as past actuality, as record, and as thought. He defines 'history' as 'thought about actuality, instructed and delimited by history as record and knowledge – record and knowledge authenticated by criticism and ordered with the help of the scientific method'.⁷⁴ More than Becker, Beard emphasized the contemporary significance of history and the need for the historian to clarify his personal values and his frame of reference.

One of Beard's central concerns was to reconcile his rejection of 'the pretensions of the scientific method in history and his awareness that some standards of truth and objectivity are necessary in order to be a responsible historian'. He was also concerned to argue that history should throw light on contemporary issues and to justify his own, albeit ambivalent, espousal of a particular ideology. Beard's response to these problems was unsatisfactory, involving on the one hand a naive exaggeration of the objectivity of physical science in contrast with history and an equally dubious espousal of a belief in progress: 'History as actuality is moving . . . on an upward gradient towards a more ideal order.'⁷⁵ Beard's final profession of faith was hardly sceptical in spirit.

Some of the standard criticisms of Becker and Beard and their European precursors have been usefully summarized by Fischer: first, they confuse the way knowledge is acquired and the validity of that knowledge; secondly, they mistakenly argue that because an account is incomplete, it follows that it must be false; thirdly, 'relativism makes false distinctions between history and the natural sciences' as, for example, when Beard attacked the use of hypotheses in history; fourthly, relativists such as Beard and Mannheim either inconsistently or implausibly sought to exempt themselves from relativism in some degree. Finally:

the idea of subjectivity which the relativists used was literal nonsense. 'Subjective' is a correlative term which cannot be meaningful unless its opposite is also meaningful. To say that all knowledge is subjective is like saying that all things are short. Nothing can be short, unless something is tall. So, also, no knowledge can be subjective unless some knowledge is objective . . .⁷⁶

It is not necessary here to consider which, if any, of these criticisms are valid, or whether they can fairly be applied to Becker or Beard. The common ground between the relativists and their critics is as interesting as their differences. Most critics of relativism are prepared to concede that nineteenth-century historicism, at least in its extreme form, was naive and untenable; they acknowledge that a 'complete' account of past events is impossible and that history involves selection, interpretation and arrangement (some would add explanation), thus opening the way for the personal element. They acknowledge that historians are influenced by circumstances of time and place and interest and that there are many obstacles in practice to attaining objectivity in history.

For their part Becker and Beard and their modern counterparts would probably not have condoned some of the practices which may have been encouraged or even justified in the name of relativism: a cavalier attitude to factual detail, the politically motivated doctoring of history or the squeezing of the facts to fit simplistic and rigid prejudices masquerading as frames of reference. As we have seen, neither Becker nor Beard was a philosophical sceptic, in that both acknowledged the possibility of objectively true facts; Beard expressly argued that 'extreme relativism is self-refuting' and neither, so far as I know, has he been accused of 'disrespect for facts'.⁷⁷

The central points at issue between the historical relativists and their detractors seem to be 'whether there is any possibility of formulating criteria for deciding about the scientific adequacy of different histories'⁷⁸ (White) and whether there is any possibility of 'warranted explanation' in history (Nagel).⁷⁹ One of the harshest critics of relativism, Fischer summed up his position as follows:

There is, of course, something that is profoundly right in relativism. It is true that history is something which happens to historians. And it is correct to argue that no historian can hope to know the totality of history as it actually happened. But it is wrong to conclude that objective historical knowledge is therefore impossible. The conventional wisdom of contemporary historiography still consists in the common idea that 'a historian cannot know what *really* happened, but he has a duty to try'.⁸⁰

What are the similarities and the differences between historical and adjudicative enquiries into issues of fact? In the legal literature this question has tended to receive a fairly standard answer,⁸¹ which might be restated as follows: the historiographer and the legal scholar have a shared interest in such questions as: Is knowledge of (particular) past events possible? What is involved in proving that a particular conclusion about the past is true? What kinds of reasoning are involved in reasoning towards conclusions of fact? Is it possible to formulate canons of evidence and standards of proof in such contexts? But there are also important differences between historical and legal approaches to the pursuit of truth about the past. The aims of each process are different; typically the judge has a duty to decide every case before him, however incomplete the evidence; no such duty is imposed on the historian;⁸² the methods, the resources, the timing and the procedures of each type of enquiry are characteristically different. Particularly important in the present context

is the point that in legal contexts the selection and interpretation of past facts is characteristically governed, at least in theory, by relatively precise pre-existing rules which provide both standards of materiality and a set of categories for classifying particular events. The historian is typically concerned with describing, explaining and attributing significance to unique past events; in judicial process similar objects of enquiry (unique past events)⁸³ have to be described in terms of concepts and at a level of generality which makes it possible to determine whether or not they fall within or outside the scope of general rules. Thus the historian's task of selection and interpretation and the lawyer's task of categorization of past facts are rather different. There is an important sense in which fact-determination in adjudication is concerned very largely with trivial or platitudinous truths (Plattheit), that is to say with statements of the kind: 'X died on 20 December 1930' or 'It was Y who killed Z'.⁸⁴ These are not trivial in the sense that they are necessarily unimportant or insignificant to the individuals affected. But establishing such facts does not involve explanation nor interpretation nor the establishment of general truths – all major sources of concern to relativists. Nor, typically, is the person charged with determining the truth of alleged facts responsible for selection – what are the material facts in a particular case is typically determined by the rules of law and by the pleadings, which often remove another source of indeterminacy familiar to lawyers, the choice of an appropriate level of generality. Thus, in this view, at the point of decision about disputed issues of fact in adjudication (in the narrow sense it is used here), most of the difficulties which lie at the root of the central concerns of historical relativism have been filtered out – selection, interpretation, explanation and arrangement are not normally involved in determining the truth or otherwise of facts in issue.

This account is both attractive and plausible given the assumptions on which it rests. But is not rather a lot being taken for granted?

First, it is assumed that there is a typical or standard case for each type of enquiry. The standard case of adjudication is assumed to be an untrained trier of fact deciding on the truth of one or more allegations about *particular* past events. 'The historian' is also concerned with 'describing, explaining and attributing significance to *unique* past events'. These are, indeed, recognizable examples of each type of enquiry, but in what sense are they 'typical' or 'standard'? Surely not all triers of fact are non-expert, not all facts in issue are particular or unique.⁸⁵ Nor are triers of fact only concerned with facts in issue: as we have seen, the structure of reasoning in adjudication typically involves appeal to intermediate propositions, many of which will be generalizations of one kind or another. Similarly there is not one type of historical enquiry: do Herodotus and Namier and Toynbee and E. P. Thompson and Sir Mortimer Wheeler all conform to the same model of the typical historian? And, does each of these pursue only one type of enquiry? The orthodox comparison of standard cases of historical and legal enquiries can be illuminating, but it needs to be recognized that it rests on a very simple view of both historiography and adjudication.

Secondly, the notion of 'fact' in adjudication is more problematic than the orthodox view suggests. While it is true that for certain purposes, for example making probabilistic calculations, we have to proceed as if questions of fact can be and have been sharply differentiated from questions of value – an *is/ought* distinction has to be postulated – even within the Rationalist Tradition it is widely acknowledged that triers of fact are regularly and unavoidably involved in making evaluations.⁸⁶ Thus it is misleading to suggest that legal enquiries into questions of fact are value-free in the way that historical enquiries are not. Evaluation is regularly involved in both types of enquiry, though not necessarily in identical ways. In so far as some historiographers are concerned about the possibility of objectivity or detachment in the writing of history their concerns are at least analogous to questions about the possibility of impartiality or objectivity in adjudication.

Thirdly, it may be objected, a false comparison is being made between historical and legal enquiries in that the total process of historical investigation is being compared with one point only in legal processes, the adjudicative decision. Thus, in so far as it is the case that triers of fact are typically not involved in selection, interpretation, explanation and arrangement (and this is at best an overstatement), this is partly because some such difficulties or choices have been resolved at earlier stages in the process, often by other participants. The adjudicator's 'givens', the rules of law, the particular allegations, the levels of generality, the conceptual framework have been 'given' by other participants in the process. In making the rules the legislator was neither constrained nor helped by any notion of materiality; the prosecutor or plaintiff may have had a range of choices as to the precise content of the charges or allegations; the litigants framed the issues, with or without the intervention of third parties and so on. Thus while it may be the case that some of the central concerns of historical relativism to some extent do not apply directly to adjudicators, it does not follow that they are irrelevant to fact-handling in legal processes seen as a whole. It is strange to equate 'legal enquiries' with adjudicative decisions.

This is a powerful argument which leads, interestingly, to the conclusion that historical enquiries may have more similarities to factual enquiries in law than the orthodox view allows; it follows from this that the concerns of historical relativists cannot be so easily dismissed.⁸⁷ The argument can, of course, be overstated. It does not totally invalidate the comparison of historical enquiries and adjudicative decisions and, at the very least, the orthodox account highlights an interesting and highly suggestive point: historians lack the lawyers' concept of 'materiality'.

To sum up: what I have called the standard way of comparing legal and historical enquiries needs to be treated with caution, for it over-simplifies the complexity and the variety of both kinds of process and it too readily dismisses some of the central concerns of historical relativism. In so far as the orthodox view is acceptable, it suggests that the main point of contact between historical and legal concerns about proof of past facts falls largely, if not entirely, in the area where there appears to be no significant disagreement between historical relativists, such as Beard and Becker, and their critics. Where disagreement is sharpest – over the implications for

historiography of the need for selection, interpretation, explanation and arrangement – the tasks and problems of adjudicators and historians are rather different. The historians' debates are suggestive in their exploration of the obstacles to obtaining accurate accounts of past events, on the dangers latent in such notions as 'hard facts' and 'simple facts', and no doubt on many points of detail about historical method and the weight to be accorded different kinds of evidence. But historical and legal enquiries into past facts take place in different contexts and for different purposes. Historical relativism is concerned not so much with the possibility of knowledge about past events as with the practical difficulties of attaining such knowledge – a theme also central to Jerome Frank's fact-scepticism. There is little in the debates we have considered which casts serious doubt on such notions as 'established facts', 'reasoning towards particular conclusions of fact' or 'standards of proof'. On the other hand, both critics of relativism and those robust practising historians who are dismissive of these debates are concerned to rescue notions such as 'respect for facts', 'deciding on the basis of the evidence', and 'canons of evidence' from what most of them consider to be the excesses of extreme relativists.

Jerome Frank and legal fact-scepticism

It may seem paradoxical to suggest that the greatest dilettante in American Jurisprudence was essentially a man of one idea – a hedgehog rather than a fox. Jerome Frank may have read more widely and written about more topics, legal and non-legal, than most jurists; but a single thread runs consistently and repetitively through his work: an obsessive concern with the uncertainty of fact-finding in law.⁸⁸

Frank is one of the main sources of inspiration for the enterprise of taking facts seriously. It was he, more than anyone else, who directed attention to a striking imbalance in academic law and, more generally, in our legal consciousness. While over 90 per cent of contested cases are decided on disputed issues of fact in courts of first instance, a similar proportion of academic attention is paid in traditional legal education and literature to disputed questions of law.⁸⁹ Frank's successors, notably the process school, have convincingly shown that in some ways Frank understated this aspect of his case. For only a small percentage of disputes ever reaches trial, most of the 'action' in legal process taking place outside the courtroom in transactions which culminate in settlements, guilty pleas or decisions not to proceed and in subsequent stages of the process such as sentencing, post-conviction decisions and enforcement of judgments.⁹⁰ The impetus to develop a theory of evidence, proof and fact-finding is rooted not only in the recognition of a need for a new framework for the study of this general area, but also in the notion that a balanced conception of academic law would place much greater emphasis on it. If Frank is right, the study of fact-finding deserves much more of our attention.⁹¹

Frank's main argument hardly needs to be restated. The central notion is the unreachability of fact, that is to say the obstacles, some inevitable, some avoidable, to reaching objectively true judgements about past events and to predicting what the courts will find the facts to be:

The axiom or assumption that, in all or most trials, the truth will out, ignores, then, the several elements of subjectivity and chance. It ignores perjury and bias; ignores the false impression made on the judge or jury by the honest witness who seems untruthful because he is frightened in the court-room or because he is irascible or over-scrupulous or given to exaggeration. It ignores the mistaken witness who honestly and convincingly testifies that he remembers acts or conversations that happened quite differently than as he narrates them in court. It neglects also, the dead or missing witness without whose testimony a crucial fact cannot be brought out, or an important opposing witness who cannot be successfully contradicted. Finally, it neglects the missing or destroyed letter, or receipt, or cancelled check.⁹²

A great deal of *Law and the Modern Mind* is devoted to exploring why lawyers and the general public continue to believe in the utterly implausible myth of certainty. In *Courts on Trial*, a more mature, richer, but less coherent work, Frank was more concerned with artificial or removable obstacles to arriving at the truth in judicial processes – the jury, the adversary process, the exclusionary rules of evidence, the obfuscating rituals and so on. Frank's polemical writings and his controversial activities during the New Deal made him 'the *enfant terrible* of American law'.⁹³ His elevation to the bench shocked many lawyers, but pleased his admirers one of whom compared it 'to the choice of a heretic to be a bishop of the Church of Rome'.⁹⁴ But, one may ask, was Frank the profound sceptic and the radical extremist that he is sometimes depicted to be?

In what sense was Frank a sceptic? First of all there is a generally iconoclastic and doubting spirit about his approach: he hated dogma and all forms of absolutism; he emphasized the part played by chance and choice in history; he revelled in the diversity, the complexity and the unpredictability of human affairs and he suggested that acceptance of the situation – whether with stoicism or positive interest – is the hallmark of personal maturity. In respect of law his main emphasis was on the practical obstacles to attainment of accuracy, consistency and predictability in fact-finding.

Such ideas and attitudes indicate a lively, critical, doubting mind, but they do not by themselves establish Frank as a philosophical sceptic in any strong sense of that term. Yet most commentators, including the most sympathetic, treat him as an out-and-out sceptic and relativist at the most fundamental level.⁹⁵

Frank's biographer, Volkomer, argues that he was a sceptic because he was hostile to dogmatism; because, following Erich Fromm, he believed that there are few uniformities in human nature and, above all, because he believed in the relativity of knowledge.⁹⁶ The first two points are easily disposed of. It is a caricature of the cognitivist position to equate it with dogmatism: to accept the possibility of knowledge, to accept that 'we are indeed in a position to stake rationally warranted claims to objective knowledge about the world'⁹⁷ involves no commitment to dogmatic or absolutist beliefs, including the doctrinaire versions of Marxism and Fascism that Frank was concerned to attack.⁹⁸ Similarly cognitivism does not entail a simplistic belief in a uniform human nature. Volkomer's first two points correctly identify

Frank's position, but do not *ipso facto* put him in the ranks of the philosophical sceptics, as the term is used in this paper.

Frank's belief in the relativity of all knowledge requires closer examination. The nearest Frank got to a sustained development of an epistemological position was in his book *Fate and Freedom*, revealingly subtitled *A Philosophy for Free Americans*.⁹⁹ The main concern of this work is to attack dialectical materialism and, in particular, deterministic theories of history. Frank emphasizes the operation of individual choice and of chance in history; he makes great play of the point that in numerous instances historical narratives once accepted as beyond question have later proved false or misleading;¹⁰⁰ and, in developing his own version of a free will theory, he goes quite far in rejecting the principle of causality (here he purports to follow Hume).¹⁰¹ *Fate and Freedom* and some of Frank's other writings certainly contain some bold remarks – 'all human interpretations of experience are "just-so" stories';¹⁰² 'facts are guesses',¹⁰³ 'the "facts" . . . are not objective. They are what the judge thinks they are',¹⁰⁴ 'facts are human achievements, human feats';¹⁰⁵ and most history is twistory'.¹⁰⁶

Taken on their own such remarks give the impression both of a fairly extreme relativism and of some form of epistemological scepticism. Frank was neither a precise nor an analytically consistent thinker and he was prone to exaggerated statement. But a careful study of the context of many such remarks would suggest that, interpreted liberally, they are not a necessary part of his argument nor consistent with others of his statements and assumptions. As such it may be sensible to dismiss them as rhetorical exaggerations and lapses, not central to his main concerns. For Frank's main targets – in history, dogmatic versions of historical materialism; in law, complacency about the predictability, the uniformity and the efficiency of judicial 'fact-finding' – did not require him to adopt strong sceptical or relativist positions at a fundamental level. Many of his targets were specific – the jury, the exclusionary rules, 'fight' elements in the adversary process, the Langdellian system of legal education.¹⁰⁷

Sceptical about what? On this interpretation Frank was not a philosophical sceptic in Ayer's sense.¹⁰⁸ He clearly accepted the possibility of objective knowledge about particular past events;¹⁰⁹ he delighted in William James's notion of 'wild facts', but this implied an acceptance of 'tame' or 'hard' facts with which 'wild facts' are contrasted.¹¹⁰ He talks of 'avoidable mistakes',¹¹¹ of 'real objective past facts';¹¹² his scepticism about logic relates to the role of *deductive* logic in the law;¹¹³ he explicitly claims to be concerned with making judicial processes 'more rational'.¹¹⁴ There is little in his writings which seriously questions the use of the language of 'evidence', 'inference', 'standards of proof' or 'rectitude of decision' in discussing evidentiary issues, except some provocative dicta such as that 'facts are guesses'¹¹⁵ and his more plausible suggestion that 'it is misleading to talk . . . of a trial court "finding" the facts . . . More accurately, they are processed by the trial court – are, so to speak, made by it on the basis of its subjective reactions to the witnesses' stories'.¹¹⁶

The main objects of Frank's scepticism are (a) optimistic aspirations (and claims) to unattainable ideals of objectivity and uniformity and (b) belief in a number of widely held axioms which, in his view, misdescribe the realities of legal processes.¹¹⁷ Frank in part shared similar concerns to the historical relativists about the difficulties of attaining accurate accounts of the past, but a great deal of his fire is directed to specific, contingent features of the American legal system which were in his view capable of being improved.

How sceptical was he? While there is undoubtedly a strain in Frank which relishes the uniqueness of individual events and the elusiveness of reality, I would suggest that he was far from being the cynic or extremist that some critics have depicted. In *Courts on Trial*, responding to his critics, Frank went out of his way to reject 'absolute relativism', 'nominalism', 'anti-rationalism' and various other forms of extreme 'isms' of which he had been accused.¹¹⁸ Even in *Law and the Modern Mind* his model is the mature adult 'questioning – not hastily, angrily, rebelliously, but calmly and dispassionately – our bequests from the past, our social heritage . . .'¹¹⁹ 'The stage of complete maturity is reached when the relativity of all truths is accepted but seen to be compatible with their provisional validity.'¹²⁰ He would have strongly denied that he was a disappointed absolutist. Today Frank hardly seems to fit the image of a radical – his prescriptions to modern eyes might seem to be a rather optimistic blend of measures designed to make decision making fit more closely to a rational model of truth-seeking (abolish exclusionary rules, substitute truth-theory for fight-theory) linked to a characteristically American faith in education as a cure-all. He looks more like a reformist than a radical by the standards of today.¹²¹ There is little in Frank that seriously and consistently challenges any of the central assumptions of the Rationalist Tradition.

Thus, contrary to his image, Frank is not far from the mainstream of the Anglo-American tradition, without sharing the complacency of some of its leading exponents. By drawing attention to the distorting influence of 'appellate court-itis' and to the importance of disputed issues of fact, he raised some key questions that need to be confronted by a theory of EPF. He can claim some credit for building bridges between law and psychology, especially Freudian psychology. But he failed to develop systematically or in detail what would be involved in a sustained study of 'fact-finding'. His course on fact-finding at Yale was too abstract and jurisprudential really to come to grips with the detailed implications of the questions he had raised; having pointed to an imbalance in our legal culture, he allowed himself to be side-tracked first into psychological speculations about why lawyers cling to untenable myths and later into a not very carefully thought out programme of reforms. Holmes never worked out in detail the full implications of his 'bad man' insight for the practice of legal education;¹²² similarly Frank failed to follow through the full implications of his one great idea for a broader and richer perspective on law. He sowed the seed for the present enterprise, but he failed either to sell the idea or to give it a solid theoretical base.

The Sociology of Knowledge and the social construction of reality

Pressures of space and my own ignorance make it impossible to do justice here to the complex history of the Sociology of Knowledge and the possible bearing on law and on a theory of EPF of some of its offshoots such as phenomenology and ethnomethodology.¹²³ But it is appropriate to make at least a brief reference to some of this work, for it is making a significant impact on the study of judicial processes.

One of the main jumping off points for a Sociology of Knowledge is the fact that what passes for 'knowledge' varies from society to society. Perhaps the *locus classicus* is Aristotle: 'Fire burns both in Hellas and Persia; but men's ideas of right and wrong vary from place to place.'¹²⁴ So do their ideas of fact and fiction. The very notion that 'knowledge' is itself a social product at least raises questions about claims to objectivity of particular examples of knowledge. It is not surprising to find most sociologists of knowledge and phenomenologists explicitly claiming to be relativists of some sort. It is also natural that questions about the possibility of objective knowledge are central to the concerns of leaders in the field, such as Mannheim. If all knowledge is in some sense a product of social processes can there be objective knowledge of reality independent of particular social contexts? If not, can the sociologist of knowledge claim any special status for his relativist thesis?

The centrality of the concern about basic epistemological issues does not seem to have led the pioneers in the field into positions of philosophical scepticism in a strong sense: few seem to deny the possibility of objective knowledge. Thus Marx, if I understand his thesis about ideology correctly, while maintaining that what has passed for 'knowledge' in pre-industrial and capitalist societies has been systematically distorted and conditioned, both consciously and unconsciously, by class interests, nevertheless envisages the possibility of attaining objective, impartial knowledge of the external world in a classless society.¹²⁵ Nor, at a more specific level, does he deny the possibility of objective knowledge of particular 'hard facts' even in capitalist society. He is not, in short, a philosophical sceptic *au fond*. Similarly, Karl Mannheim introduced the term 'relationism' to distinguish his position from that of extreme relativists and devoted a good deal of effort to developing the thesis that intellectuals, by virtue of their detachment and alienation from society, are less prone to the distortions of ideology and are charged with the task of moving towards 'a correct understanding of human events'¹²⁶ through the accumulation of different perspectives.¹²⁷ Although the problems of epistemology were central to Mannheim's concerns, he was hardly in either his attitudes or his conclusions a philosophical sceptic in Ayer's sense of the term.

The same appears to be true of Berger and Luckmann's *Social Construction of Reality*, which has stimulated a lot of interest within the sociology of law. They start their work with an express disclaimer of 'any pretention to the effect that sociology has an answer' to the philosophical preoccupations of the epistemologist.¹²⁸ The philosopher asks: What is real? How is one to know? The sociologist asks: How did what passes for 'knowledge' in any given society come to be socially established as

‘reality’?¹²⁹ ‘The sociology of knowledge must concern itself with whatever passes for “knowledge” in a given society, regardless of the ultimate validity or invalidity (by whatever criteria) of such “knowledge”.’¹³⁰ Thus Berger and Luckmann expressly beg ‘ultimate’ philosophical questions about the possibility of knowledge and there is ample evidence from their writings that they themselves need notions of accuracy, distortion, and falsification, as well as more general notions of ‘objectivity’ in their own analysis.¹³¹ They are concerned to explore certain questions about what is involved in the social processes of knowledge formation and construction of different ‘realities’.

One of the main objectives of Berger and Luckmann was to help to shift the focus of attention of the sociology of knowledge from the study of theoretical ideas (the main concern of most of the early pioneers) to the study of everyday ‘realities’: *‘The Sociology of Knowledge must concern itself with everything that passes for “knowledge” in society [authors’ italics] . . . Common sense “knowledge” rather than “ideas” must be the central focus for the sociology of knowledge.’*¹³² This shift of attention has helped to bring the concerns of sociologists of knowledge much closer to legal concerns. For not only are all forms of ‘legal knowledge’ and specifically ‘legal realities’, whatever those may be, brought within the scope of the sociology of knowledge but, more importantly, both a theory of EPF and the kind of approach advocated by Berger and Luckmann have a special interest in what passes for ‘common sense’ or ‘everyday knowledge’.

Let us take an example that is not immediately obvious – the lawyer’s concept of ‘relevance’ in fact-finding. The first rule of admissibility of evidence is that all evidence which is irrelevant is to be excluded; only relevant evidence is admissible.¹³³ What is the test of relevance in this context? This is one of the more problematic questions in the subject of Evidence, even within the expository tradition. On one view, that I am inclined to favour, an evidentiary fact is relevant or potentially relevant to a *probandum* (i.e. a fact to be proved), whether intermediate or ultimate, if it has some connection with it – the test is: does it tend to support (or negate) the *probandum* at all?¹³⁴ On what basis do we establish this connection? The answer is largely on the basis of what Berger and Luckmann call ‘the available social stock of knowledge’ in a given society.¹³⁵ Jonathan Cohen in discussing inductive probabilities puts the matter as follows:

The inductivist analysis, however, has no difficulty at all here. It presupposes only that when a jurymen takes up his office his mind is already adult and stocked with a vast number of commonplace generalizations about human acts, attitudes, intentions, etc., about the more familiar features of the human environment, and about the interactions between these two kind of factors, together with an awareness of many of the kinds of circumstances that are favourable or unfavourable to the application of each such generalization. Without this stock of information in everyday life he could understand very little about his neighbours, his colleagues, his business competitors, or his wife. He would be greatly handicapped in explaining their past actions or predicting their

future ones. But with this information he has the only kind of background data he needs in practice for the assessment of inductive probabilities in the jury-room ... The main commonplace generalizations themselves are for the most part too essential a part of our culture for there to be any serious disagreements about them. They are learned from shared experiences, or taught by proverb, myth, legend, history, literature, drama, parental advice, and the mass media. When people ceased to believe that those who had insensitive areas of skin were in commerce with the Devil, it was symptomatic of a major cultural change.¹³⁶

In this view the main source of criteria of relevance in legal contexts at any given time is the social stock of knowledge.

Let me illustrate this by an absurd example. In the jurisdiction of Sodom there is an offence of fomenting earthquakes. X and Y, two homosexuals, are accused of this offence, in connection with an earthquake that occurred on 31 March. The only evidence against them is that on 30 March they committed a homosexual act in private. In our culture it is 'known' that there is no connection between homosexuality and earthquakes. But in Sodom it is known that homosexuality causes earthquakes – indeed, this is the basis for the offence. Thus in Sodom the evidence is relevant to the charge, in our culture it is not. We 'know' that there is no connection between the two events.

There is no denying the strong relativistic currents within the field nor the generally sceptical spirit noted by Berger of much of the writings. Berger and Luckmann, for instance, take the relativity of knowledge as their starting-point: 'Sociological questions about "reality" and "knowledge" are thus initially justified by the fact of social relativity. What is "real" to a Tibetan monk may not be "real" to an American businessman.'¹³⁷

There is then a sceptical tendency – but how sceptical about what? We have seen that there is little evidence of philosophical scepticism in the strong sense. But it is claimed that belief is a function of time, place and circumstance and there is plenty of questioning of *particular* claims to objectivity, especially in respect of 'official views'.¹³⁸ At a general level Peter Berger reminds us of possible gaps between legal and sociological perspectives:

The lawyer is concerned with what may be called the official conception of the situation. The sociologist often deals with very unofficial conceptions indeed. For the lawyer the essential thing is to understand how the law looks upon a certain type of criminal. For the sociologist it is equally important to see how the criminal looks at the law.¹³⁹

A broadened conception of legal scholarship involves, *inter alia*, a broadening of lawyers' perspectives to include much more than merely official points of view.¹⁴⁰ It should include the standpoints and perspectives of all participants in legal processes and transactions – and here the work of writers like Schutz and Collingwood clearly has direct relevance. In respect of EPF there are many specific points of contact: how official records are created, how some deaths are classified as suicides, and how

information is processed *en route* to presentation to decision makers, are examples of points of shared concerns between lawyers and sociologists of knowledge. One of the main contributions that sociologists can make in this area is to make us question the claims to objectivity and reliability of *particular kinds* of evidence. In this context a sceptical, questioning approach is likely to be immensely useful.¹⁴¹

There are, however, some dangers. The general sceptical spirit or style of some writings in this vein may at least give the impression that the writer is a philosophical sceptic or a suicidal relativist. Such an impression may be quite misleading or the writer may have been carried away by debunking enthusiasm to make statements which imply a fundamental scepticism which is neither logically necessary nor internally consistent with the basic points he is making.¹⁴²

To take one example: in an interesting paper entitled 'The Social Construction of Truth: Some Thoughts on Jury Trials and Current Research into Juries', Michael Freeman argues that much recent jury research is based on naive assumptions both about the role of the jury and about the processes by which jurors reach decisions.¹⁴³ Much of the research, he points out, assumes that the only role of the jury is to act as a fact-finder according to some rational model of adjudication. This, he argues, overlooks the symbolic functions of the jury and in particular its role in allowing community sentiment to exercise some check on the rational bureaucratic 'output of justice'.¹⁴⁴ Furthermore, Freeman argues, it is naive to assume that the decision-making process of juries is to seek 'a right answer, an objective truth almost . . . [by] a uniquely correct method of ascertaining of this truth'.¹⁴⁵ Rather, using Garfinkel's model of the trial as a degradation ceremony, Freeman suggests that in contested trials the jury 'constructs its own reality' from the conflicting versions of reality which are presented to it.¹⁴⁶

I have a good deal of sympathy with Freeman's criticism of some of the simplistic assumptions of much jury research; I also find his analysis of notions such as 'perverse' and 'lawless' verdicts illuminating. But in the process of debunking some simplistic views, Freeman appears to commit himself to some converse simplicities.

First, he sets up some artificially soft targets in his account of 'the official view' and 'the rational legal model of legal authority'.¹⁴⁷ Who seriously maintains that in practice jurors are concerned *only* with determining facts on the basis of reasoning from the evidence presented to them or that there is a uniquely correct method of ascertaining the truth? Neither jury researchers nor EPF theorists in the Rationalist Tradition need to be saddled with such simple-minded views. What they do claim is that attempting to determine the truth of particular past events by rational means on the basis of evidence is one central aspiration of any system of adjudication and that it is a ground for criticism if the system in practice falls far short of or does not accept this as an aspiration. To acknowledge a role for the jury in frustrating unpopular laws or restraining official zeal in other ways does not involve a denial that its central task is to try to make accurate determinations of fact.

Secondly, Freeman scornfully dismisses the idea 'that there is a right answer, an objective truth almost'.¹⁴⁸ What precisely is Freeman denying here? Taken at its

face value this kind of statement has some extraordinary implications – it suggests for example that no court has ever made a mistake, that no one has ever been wrongly convicted, that there never has been a miscarriage of justice. For this kind of descent into irrationalism allows no room for concepts like ‘mistake’ or ‘error’ or ‘falsehood’ or ‘wrongful conviction’. We are left with no basis for criticizing decisions on questions of fact. This looks very like suicidal relativism.

Thirdly, Freeman substitutes for a caricature of a rationalist view an account of jury decision-making which is equally simplistic:

But always in contested trials two or more competing pictures of reality confront the jury. From this material the jury must construct its own reality. It is confronted with a plethora of conflicting claims. Its job is to make sense of the situation, to make it meaningful. It by no means follows that the jury will pick one side’s story. It is quite possible for it to take segments of competing versions of the truth and to weld the whole into a composite picture. It selects using criteria of its own commonsense, everyday understandings of situations. What it repeatedly asks itself is whether the defendant conforms to its conception of the stereotype of whatever criminal he is alleged to be. Alan Blum, in an essay on the sociology of mental illness, put it like this: ‘jurors use the act as an occasion for reviewing the defendant’s biography to determine whether the character of the action is discrepant with some conception of the defendant based on a reading of his biography . . . an insane defendant should have a biography that supports such conception’. If the jury, then, decides that the defendant does so conform, then the label of deviant is successfully fixed.¹⁴⁹

To substitute for the picture of twelve rational men objectively reasoning towards objective conclusions a picture of twelve entirely subjective creatures intuitively picking one side’s story and arbitrarily constructing stories of their own is surely to trade one caricature for another. Now, it is clear that there is an enormously rich, complex and fascinating field of enquiry into what is involved in constructing, presenting, receiving, testing and taking with a pinch of salt ‘plausible stories’. The connections between the advocate’s concept of ‘the theory of a case’, ideas about ‘coherence’, historians’ concerns about narration, sociological interest in constructing reality and many other notions that float around in our confusing intellectual world are crying out to be mapped and explored. In respect of adjudication of disputed issues of fact such notions *prima facie* seem to be both important and neglected. But it is just not good enough to throw out by implication all the accumulated lessons of the logic and psychology of proof and what professional lawyers claim to have learned by experience, by substituting a simple picture of choosing between plausible stories purporting to present competing versions of reality – perhaps between two *gestalts*? This does justice neither to the complexity of the subject matter nor to the sophistication of the intellectual heritage of the Rationalist Tradition.¹⁵⁰

This criticism may be based on an unfairly literal reading of Freeman’s paper; nor is it reasonable to treat one paper as representative of the rich variety of approaches to the study of legal processes that have been stimulated by different ideas derived

from the sociology of knowledge.¹⁵¹ Furthermore, I readily concede that within this enormously diverse branch of social theory there are strands which have strong claims to be regarded as genuinely sceptical at the level of philosophy or which present direct challenges to the epistemological premises of English empiricism. However, the main points in this section still stand: first, that some of the sociologists of knowledge who have been influential on legal thought, such as Mannheim and Berger and Luckmann, have dissociated themselves from philosophical scepticism and extreme relativism. Secondly, that such notions as constructing reality (or conviction or stories) or processing information or manufacturing evidence are not *necessarily* inconsistent with standard forms of empiricism and so do not *ipso facto* present a direct challenge to the fundamental assumptions of the Rationalist Tradition. Thirdly, there is a strong tendency to rhetorical exaggeration in writings of this kind: this often leads to artificial polemics or self-contradiction. The potential of various forms of constructionist and related approaches is more likely to be reached sooner, if their exponents confronted the most sophisticated versions of aspirational rationalism rather than being satisfied with debunking caricatures of common sense and official views.¹⁵²

The Bridlegoose challenge and the forensic lottery

When Pantagruel came to Mirelingues he was invited to attend at the Trial of Judge Bridlegoose, who was being called on to explain why he had pronounced a sentence on the Subsidy-Assessor, Toucheronde ‘which did not seem very equitable to that Centumviral Court’.¹⁵³ Bridlegoose’s principal defence was that his sight was failing by virtue of old age with the result that he may have misread the dots on his small dice which, having read the papers several times, he threw in order to decide causes and controversies at law: small dice for complex cases and large dice for simpler ones. As ‘the Imperfections of Nature Should never be imputed unto any for Crimes and Transgressions’, he had a complete defence, if he had indeed misread the dice.¹⁵⁴ Since you decide by the chance of the Dice, he was asked, why do you spend so long studying the writings and ‘Papers and Other Procedures contained in the Bags and Poaks of the Law-Suitors’?¹⁵⁵ In response, Bridlegoose gives three reasons: for the sake of Formality, which alone can validate the proceedings; in lieu of corporeal exercise; and because ‘Time ripeneth and bringeth all things to maturity . . . Time is the Father of Truth and Vertue.’ After adequate delay the losing parties will with much greater patience and more mildly bear their misfortunes at the hands of chance.¹⁵⁶

Rabelais was specifically concerned to satirize the minutiae of the Pandects¹⁵⁷ as well as the more familiar targets of the chicaneries of lawyers and the defects of legal procedures.¹⁵⁸ But Judge Bridlegoose is sometimes interpreted as throwing down a broader challenge to the law – to do better than the dice, that is to get correct results in more cases than could be obtained by chance.¹⁵⁹

Interest in Bridlegoose has recently revived in connection with discussions about the potential uses and abuses of mathematical reasoning in legal processes.¹⁶⁰ If decisions on questions of fact have to be based on assessments of probabilities, then

surely the correct criteria for such judgements must be one or other versions of the calculus of probabilities? But the conditions for making such calculations are strict: for example, in the classical doctrine of chances, when applied to estimating the chances of throwing ten sixes in succession with a dice, the multiplication rule applies if and only if a number of conditions are satisfied: for example, that the dice is unweighted; that the throwing is fair; that the outcomes are mutually exclusive at each throw; that each throw is independent of the previous one; that the report of each outcome is correct and is accurately recorded; that the person making the calculation is able to apply the calculus correctly, and so on.¹⁶¹

It is significant that at his trial Judge Bridlegoose felt no need, and was not asked, to justify his method of decision. However, it is not difficult to reconstruct a possible justification from Rabelais's account of the trial. The conditions for the application of the doctrine of chances are satisfied, if one completely divorces the throwing of the dice from the merits of the evidence and the arguments of the parties and postulates that the prior probabilities are even. From the standpoint of the judge, there was an equal chance in every case that either party might be right.¹⁶² Throwing dice ensured that in every case each side had an exactly equal chance of winning. Over the long run it was statistically highly probable that he would get the right result in about half the cases;¹⁶³ whereas given the arbitrary confusion of the Pandects, the obfuscations and chicaneries of lawyers and the possibility of his own fallibility or corruption, there was no such guarantee that he would achieve this level of justice by purporting to decide on the merits. The method of deciding could be adjusted to reflect the different standards of proof; for example, 50 per cent in civil cases, longer odds against conviction in criminal cases.¹⁶⁴ Interpreted thus, Judge Bridlegoose challenges any system of adjudication and, in the present context, adherents of Rationalist theories of adjudication to demonstrate that both in design and actual operation the system gets the correct result in more cases than would be achieved by a game of chance.¹⁶⁵

We can now consider the Bridlegoose Challenge in the context of recent debates about probabilities in the law. The debate falls roughly into two stages. Initially a number of writers, notably Kaplan, Finkelstein and Fairley, Tribe, Eggleston and Cullison, discussed at length the scope, limitations and dangers of mathematical reasoning about probabilities in respect of disputed issues of fact in litigation.¹⁶⁶ While there have been disagreements on specific issues – for example, whether mathematical reasoning, in particular Bayesian analysis, should be allowed in legal argument as a matter of policy – all seem to have been agreed on three main points: first, that reasoning about probabilities is in principle a form of mathematical reasoning; secondly, that the conditions for the use of such reasoning are rarely satisfied in practice in legal contexts; thirdly, that it would be undesirable as a matter of policy to permit widespread use of this kind of argument, even where theoretically appropriate, at least until lawyers and decision makers have had an adequate basic training in the appropriate mathematical techniques.¹⁶⁷

Since 1977 the debate has shifted ground to a more fundamental issue. Jonathan Cohen has suggested that there is a non-mathematical mode of probabilistic reasoning (what he calls Baconian probability) in addition to the mathematical (Pascalian) mode and that Baconian probability is characteristically used by lawyers in reasoning about disputed questions of fact in forensic contexts, at least in the common law system.¹⁶⁸ The view that all reasoning about probabilities is Pascalian is mistaken. Cohen concedes that there is some scope for Pascalian probability in legal contexts, but it is much more limited in theory as well as in practice than the Pascalians admit. In particular they are mistaken in thinking that the appropriate mode of reasoning is mathematical in respect of standards of proof, convergence and corroboration and in assessing the weight or cogency of evidence in respect of ultimate *probanda* and the case as a whole.

Cohen's thesis provoked sharp retorts from Eggleston and Glanville Williams in the *Criminal Law Review*¹⁶⁹ and similar, sometimes hostile, reactions have come from mathematicians, lawyers and others in the United States.¹⁷⁰ Two main lines of attack on Cohen's thesis need to be distinguished. First, one approach is to deny the proposition that there is or can be more than one kind of probabilistic reasoning; a second approach is to argue that, whether or not there is a coherent and valid method of non-Pascalian probability, Cohen's reasons do not support his conclusions. In particular, it has been suggested that his arguments about standards of proof and convergence and corroboration are mistaken and that several of his particular examples are explicable in terms of Pascalian probabilities. A third, moderate position is that Cohen's Baconian principles can be accommodated within a sophisticated version of the Pascalian calculus.

For present purposes the validity or otherwise of the various arguments is not in issue. My own tentative position is that Cohen is correct both in maintaining that there is a valid form of non-mathematical probability and that this mode of reasoning is appropriate to many arguments about evidentiary issues in forensic contexts. I suspect, however, that he may have overstated the case against the application of Pascalian probabilities in these contexts and that some of his specific arguments are not as dispositive as he suggests. What is of immediate interest is the implications of the view, such as that of Glanville Williams, that any reasoning about probabilities which is not notionally translatable into mathematical form is not reasoning at all. For, if this is correct, it suggests an extreme form of scepticism about the prospects for rationality in fact-finding in adjudication. Put simply the argument goes as follows:

- 1 the characteristic argument in legal contexts about disputed questions of fact is an argument about probabilities;
- 2 all valid arguments about probabilities are Pascalian arguments;
- 3 Pascalian arguments are usable only if certain stringent conditions are satisfied;
- 4 these conditions are only exceptionally capable of being satisfied in legal contexts;
- 5 it follows that the conditions for valid reasoning about disputed questions of fact in legal contexts are only exceptionally capable of being satisfied – or, to put it differently, most of what passes for argument about evidentiary issues is not reasoning at all.

If this is correct it puts at least some defenders of the mathematical thesis in the position of sceptics in the debate about the problem of induction. It also seems that they may be more sceptical about the prospects for rationality in adjudication than any of the theorists we have considered to date. For they are committed to the proposition that it is only very exceptionally that the conditions for the only valid kind of reasoning are satisfied in practice. If this is correct, it plays straight into Bridlegoose's hands: 'On your own admission, most of what passes for argument in litigation is not rational. It is merely a facade or a delusion. My method ensures 50 per cent correctness and eliminates judicial bias; given the possibilities for chicanery, bias and inequality of resources between the parties, we cannot be nearly so confident about the outcomes secured by so-called "rational" methods. So my method is superior to yours.'

The matter is not quite as simple as that, for there are at least two different lines of escape for Pascalians. The first is to resort to estimates of frequency; the second is to treat judgements about particular past events as subjective probabilities, but then to argue that these can be translated into a form which is susceptible to the mathematical calculus by resorting to the notion of laying odds in a fair system of betting.

To concretize the discussion let us take as our starting-point a quotation from a work on the philosophy of history which states a view similar to that of Jonathan Cohen. Atkinson postulates two premises in dealing with judgements of probability about particular past events (simple facts):

The first is that the probability which may be enjoyed, or suffered, by historical statements is not the probability of the mathematical theory of chances: there is no possibility of putting a numerical value on the probability that Napoleon's illness contributed to his defeat at Waterloo in anything like the way in which one can put a value of one-half on the probability of obtaining a head with any toss of a fair coin. The second, and for present purposes more important, premise is that non-mathematical probability assessments are not merely expressions of subjective confidence but rather to be founded on evidence. (To couple a subjective view of probability with the notion that history is exclusively a matter of probability is, of course, fatal to history.)¹⁷¹

How might a Pascalian react to this? One response is that any event which is normally viewed as unique 'can be conceived as recurrent'.¹⁷² Thus in Atkinson's example we can make some more or less informed estimates about such matters as the correlation between illness of commanders and defeat in battles of a certain kind and the correlation between points of time when Napoleon was similarly ill and his efficiency in performing tasks of the kind that he was called on to perform at Waterloo and so on. In short, arguing by analogy from previous similar instances, one constructs generalizations of the kind: 'The outcome of battles is very rarely affected by the health of generals' or of a more particular kind, such as, 'Napoleon's efficiency was frequently impaired by bouts of illness'. Such more or less speculative generalizations can then be translated into numerical terms as estimates of frequency. The fact that,

in this kind of example, such estimates are very largely guesswork based on almost no evidence does not undermine the mathematicist theory; rather it brings to light the largely speculative and unreliable nature of such judgements. What the mathematicist suggests is that a rational reconstruction of probability judgements about unique past events necessarily involves reliance on such estimates, however speculative and unreliable they may be. Typically such estimates are implicit; the process of making them explicit may serve to indicate both how well or ill-founded a particular judgement may be and what kind of information would be helpful in making the estimates, and hence the judgements, more reliable.¹⁷³ 'Rationality' from this point of view requires the strengthening of the empirical basis for such estimates of probability.

Most people would concede that estimates of frequency are often relevant to the formation of judgements about the probability of unique past events. The relationship between the health of commanders and the outcomes of battles of a certain kind is relevant. But is it the case that estimates of frequency are the *only* kind of premise on which such judgements may be based? An alternative approach for the mathematicist is to resort to subjective probabilities. A statement about the 'probability' of a unique past event is a statement about the strength of belief about the likelihood that such an event in fact occurred. In short it is a judgement in terms of subjective probability. It may be based on intuition, informed estimates about frequencies, pure guesswork or different kinds of reasons. But such subjective probabilities can be operationalized for the purpose of making mathematical calculations by expressing them in terms of the odds that a rational man would lay on the proposition in a fair system of betting.¹⁷⁴

It is not my intention here to plunge into the theoretical morass of decision theory and the foundations of mathematics. My concern is to map a series of different positions. It seems to me that the first line of escape sketched above represents the route taken by Glanville Williams, the second that taken by Finkelstein. An inductivist response might proceed along the following lines: estimates of frequency represent one, but not the only, kind of reason which may support a judgement of probability about unique past events. Such estimates are themselves capable of rational appraisal and justification and such estimates may be arrived at in whole or in part on the basis of reasoning which may be in principle mathematical or non-mathematical or a combination of the two. Accordingly not all probability judgements of this kind are based on Pascalian premisses.

Similarly while it may be conceded that judgements of subjective probability may be translated into mathematical form by the device of postulating a system of wagers, this involves an extra step in the process of rational reconstruction of probability judgements and this step may be either problematic or unnecessary or both. For the allegedly 'subjective' belief of the rational betting man is conceded to be capable of being based on reason (how else is he a rational man?) and such reasons, argues the inductivist, are not necessarily mathematical. Such judgements are capable of being non-Pascalian inductive probability judgements and it is misleading to suggest that

it is either necessary or unproblematic to take the additional step of converting them into mathematical form. The judgements *are* judgements of probability, they can be supported by reasons some of which are governed by non-Pascalian principles of reasoning. Since they are based on reasons governed by principles of valid reasoning they are not in principle subjective.

A third version of the Pascalian position is that the Pascalian calculus, and particular aspects of it, such as Bayes' Theorem, provide a model for argument even when the conditions for application of the calculus are not strictly satisfied.¹⁷⁵ The rationalist aspiration merely requires us to use 'the best reason we can muster'. Arguments which approximate to the Pascalian model still deserve to be called 'rational', because we often have to be satisfied with something short of perfection. On one view, the Baconian thesis represents an acceptable second-best when some of the conditions for a more rigorous kind of reasoning are absent. Whether or not this is a tenable position, this and other moderate types of Pascalians, along with Baconians, accept some version of 'soft rationality' and, in so doing, have a basis for a response to the Bridle goose challenge.

To sum up: some, but by no means all Pascalians, by setting very strict standards for rationality which are rarely attainable in practice make serious concessions to the Bridle goose challenge. They are analogous to disappointed absolutists. Bridle goose has the last laugh. For he has revealed that of all the varied types of potential sceptics and relativists that we have considered, it is the most enthusiastic rationalists who are the nearest, among writers on law, to a genuinely sceptical position.

Standpoint and relativism

For our next step we return to territory familiar to lawyers. It is sometimes claimed that law is inevitably to a large extent a participant-oriented discipline and that many differences within legal discourse can be usefully explicated, perhaps even explained away, by careful clarification of standpoint.¹⁷⁶ In this view, most legal discourse is oriented more or less explicitly and more or less directly to the standpoint of one or more participants in legal processes of one kind or another. Holmes's Bad Man, Bentham's legislator, appellate court judges, the juror, the advocate and the office lawyer (or 'counsellor') are standard examples of types of participant, each of whom has different, but overlapping, vantage-points, roles and purposes. In this view, most legal discourse is *relative* to one or more standpoints with different criteria of relevance, significance and appropriateness and different ways of perceiving facts. This looks like some kind of 'relativism'; but does this kind of approach tend to lead to relativism or scepticism in the sense in which we have already encountered these terms? And what are the implications of analysis of standpoint for our perceptions of the Rationalist Tradition?

In legal theory differentiation of standpoint is recognized as having enormous explanatory potential. Hart's 'internal point of view' is the best-known modern example.¹⁷⁷ A core of truth in the generally vulnerable 'prediction theory of law' can be rescued by restricting it to the particular concerns of some actors;¹⁷⁸ Rawls has

shown how the controversy between retributivist and utilitarian views of punishment can be narrowed, but not completely dissolved, by pointing out that the former focus on the judge's question (Why punish this man?), while the latter are concerned with the legislator's question (Why prescribe punishment for offences?);¹⁷⁹ some of the puzzlements underlying debates about the *ratio decidendi* of a case can be clarified by switching from the standpoint of the judge to that of the advocate, because the latter's role in interpreting cases is less problematic;¹⁸⁰ the narrow focus of expository textbooks is in part attributable to their tendency to adopt almost identical criteria of relevance to those of appellate court judges.¹⁸¹ Failure to differentiate standpoint has perhaps been the single most fertile source of artificial polemics in jurisprudence.

Such differentiations are crucial in studying evidence. A fundamental difference between Bentham's theory of evidence and Wigmore's science of proof is that the former consistently takes the form of advice to the legislator, while the latter is addressed, mainly but not entirely, to the advocate and the adjudicator at a particular stage during trial. Most expository works on evidence tend to adopt, more or less consistently, the same criteria of relevance and of significance as appellate court judges. Traditional discussions of the notion of 'relevance' itself concentrate on relevance to already formulated facts in issue and say little about ways in which particular items of information may be relevant, according to *different criteria*, in investigation, in drafting statements of claim or formulating criminal charges, in plea-bargaining and other negotiations, and in a host of other operations in litigation, including sentencing.¹⁸² To put the matter in general terms: a coherent account of evidence and information in legal processes within a broadened conception of the study of law would, at the very least, need to deal systematically with the perception and handling of facts by all the main participants in those processes.

A distinction is sometimes drawn between observer and participant perspectives on law.¹⁸³ The participant views legal phenomena from the inside, typically with a view to action; the observer views them from the outside, typically with a view to description, explanation, understanding and, sometimes, criticism. Even in this extremely crude version, this distinction is potentially illuminating.¹⁸⁴ *Inter alia*, it helps to explain some of the different tendencies of evidence scholarship and many modern studies of judicial processes. As a very broad generalization one might suggest that by and large the Rationalist Tradition has been participant-oriented, while many, but by no means all, writers on judicial processes have adopted observer or outsider perspectives. Thus Bentham's theory of evidence and Wigmore's science of proof are first and foremost working theories for different participants. The primary audience for almost all expository work on evidence is actual and intending participants in legal processes notably judges, practising lawyers, the police and law students. Naturally their standpoints and concerns predominate.¹⁸⁵ Much of the legal literature on evidence, especially in periodicals and official reports, is concerned with the reform or codification of the law of evidence. It is addressed to, or adopts the standpoint of, the law-maker (whether legislator or judge) within

a particular system (and hence on a particular set of assumptions). Thus the great bulk of specialized writing on evidence, despite its variety, shares two characteristics: it is normative or prescriptive and it is addressed to a range of participants within a given legal system.¹⁸⁶

While some writing about judicial processes shares these characteristics, there is a discernible strand that does not. Sociological and other empirical writings about judicial processes often claim to try to describe or explain such phenomena from the outside.¹⁸⁷ Similarly much recent 'critical' legal scholarship expressly disclaims any concern to give practical advice to participants or to make recommendations for reform within the existing order (hence the use of 'reformist' as a derogatory term). 'Criticism' in this context is typically more concerned to challenge fundamental assumptions or claims of the system as a whole than to evaluate particular phenomena within a framework that takes such assumptions for granted.¹⁸⁸ Looked at in this way, it is hardly surprising that those who adopt observer perspectives should tend to be more concerned with the realities of the law in action and more inclined to question what is normally taken as given. Systematic description and sustained scepticism – at any level – are luxuries from the point of view of regular participants. It is not a coincidence that many of the examples cited at the start of this essay come from outsider perspectives.¹⁸⁹

In so far as much legal discourse is participant-oriented, does this mean that it is also relativistic? Is it a necessary or merely a contingent fact that most specialized evidence scholarship has been participant-oriented in this sense? The answers to these questions are quite closely related. Because most legal discourse is directly relevant to the standpoint of one or more types of participants in legal processes, there is a sense in which it is relativistic and partial. It is directly affected by the vantage-points, roles and purposes of particular participants in a particular kind of enterprise. Each standpoint generates its own standards of relevance, of significance and of appropriateness. For example, a given 'bit' of information might be crucial in the process of eliminating a suspect or in leading to further information, yet it might turn out at a later stage to be irrelevant to the facts in issue, or inadmissible, though relevant, or superfluous or not very important for the particular theory of the case that the advocate is trying to develop. Its relevance, its importance and the appropriateness of making use of it vary according to the standpoints of the detective, the advocate, the judge and other participants. It may get filtered out or translated into a different terminology or distorted or 'processed' in other ways as it moves through the process.¹⁹⁰

It may be objected that this kind of differentiation of standpoint is too particularistic – that particular statements of 'fact' (e.g. X saw Y leave the house at 6 p.m.) or statements of 'the facts' of a case transcend particular standpoints – that they can be true or valid or important independently of the standpoint of any particular participant. Several different considerations may lie behind such objections. First, it is clear that the standard standpoints of participants in legal processes overlap to a considerable extent. What is relevant for the purposes of the advocate is to a

large extent, but not entirely, also relevant for the judge or other trier of fact. A single textbook statement of the hearsay rule can be equally *valid* for the detective, the solicitor, the advocate and the judge; but it will be *relevant* to their purposes and be of more or less *importance* to them in different ways. Of course, there is considerable overlap between different standpoints, but this is not an objection to emphasizing the general value of clarification of standpoint.¹⁹¹

Another concern behind this kind of objection is that some legal standpoints are more important or central than others. A common example is the claim that the judge is *the* fulcrum of legal processes. Differentiation of standpoint is neutral about the relative importance of one standpoint against another – importance is itself relative to one's purposes or other standards. Judicial decisions cast a long shadow.¹⁹² For many purposes, the judge does occupy an especially important point in legal processes; for example, a central preoccupation of practising lawyers is to anticipate and influence particular judicial decisions; or, again, a great deal of negotiating takes place 'in the shadow of the law'. But unqualified, the claim that the judge is the fulcrum of all legal processes is a great over-simplification. There are many contexts in which the likely or actual decisions of judges are of little or no importance; the bad man about to embark on a course of action may be much more concerned about the likelihood of detection than about any possible judicial decision; many decisions in legal processes are taken in contexts where the chances of the matter ever coming before a court are less than one in a thousand; a tax consultant may be far more concerned about the reaction of his local inspector than about what might happen if the case reached the Commissioners or the courts. In many such instances the possibility of a judicial decision exists in the background; even if it is remote, an official or other participant *may* use a hypothetical judicial decision as a standard, but it is often the case that this is not treated as a relevant factor or is only one of a number of factors taken into account.¹⁹³

If the point being made is that some standpoints are more important than others, this is not an objection to differentiation of standpoints. If the objection is that this kind of analysis overlooks the centrality of the judge in legal processes, this objection is invalid because it is based on a false assumption about what is involved in clarification of standpoint and an over-simplified view of legal processes.

A third possible concern is that differentiation of standpoint leads to extreme relativism. The argument might be stated as follows: emphasis on different standpoints with different criteria of relevance and significance leads on to talk of 'multiple realities' and 'different worlds'. This is a short step from extreme statements of the kind 'members of different cultures live in different worlds', 'all that we have is multiple realities', or 'Ethnomethodology treats social science as one more reality among the many'.¹⁹⁴ It has been suggested that if such statements are correct, one wonders why anyone should pay attention to ethnomethodology, or how or whether crosscultural studies are possible?¹⁹⁵

Whether or not such examples of 'extreme relativism' are defensible need not detain us. For such propositions do not follow inexorably from insistence on

differentiation of standpoints in legal discourse. Such analysis is neutral on the issue of objectivity. To say that the bad man, the advocate and the judge have different vantage points, purposes, roles and concerns and hence have different criteria of relevance, significance and appropriateness involves neither acceptance nor denial of objective standards of truth or trans-subjective notions of reality.¹⁹⁶ Because even a quite simple event can be differently perceived, interpreted and reported by those who witness it, it does not follow that there are no criteria for assessing or criticizing what they report. Differentiation of standpoint may indeed have a tendency to make us cautious about particular claims to objectivity or to a monopoly of the truth, but that is a far cry from philosophical scepticism or extreme relativism.

Some strategies of scepticism

What general lessons are suggested by this tour of selected scenes from modern intellectual life? Some of them present no discernible threat to the view that notions of reason, truth and justice under the law form 'the rational core' of all adjudication; some indeed can be shown to share the same or very similar values. Thus the Sophomore and the Caricaturist can be dismissed as irrelevant; the standards of optimistic rationalism fall sufficiently short of any absolutes as hardly to offer a target to the Disappointed Perfectionist. Genuine philosophical sceptics present a direct challenge to the core notions of rationalism, but philosophical scepticism is a difficult posture to maintain consistently, except perhaps in silence; very few, if any, of those considered here seem to be serious sceptics at this level. The folk-wisdom of the Hardnosed Practitioner is typically either too simplistic or too vague to be interpreted as attacking aspirational rationalism, but lurking behind talk of 'fight theories', 'the trial as a game', 'laundering the facts', or 'effective advocacy' may be ideas that represent a genuinely different way of looking at things; for issue to be joined such ideas need to be articulated much more precisely.¹⁹⁷

Many of those who point to gaps between the law in books and the law in action, or between aspiration and reality, go beyond pointing out such lacunae to invoking, more or less explicitly and clearly, the very standards they are discussing. When they do so, their complaint is in essence that a particular system or some feature(s) of it regularly fail to achieve truth or to deliver justice under the law or to attain an acceptable degree of rationality in practice. Such criticisms present a challenge to complacent claims for a particular system, but not to aspirational rationalism. Those who dismiss talk of the Rule of Law and due process *merely* as the mystifying ideology of bourgeois or liberal legalism are often in danger of becoming victims of their own rhetoric: in relation to adjudication, notions of reason, truth and expletive justice – especially the latter – are intimately related to the classical ideal of the Rule of Law. Without care, an attack on one may take on the character of an attack on the others. Undiscriminating critiques of the Rule of Law risk throwing some important babies out with the bath-water for, if taken at face value, the critics seem to be straying into some wilderness of irrationalism, arbitrariness or self-defeating

scepticism. Such deviations are often implied or suggested by critical attacks on orthodox theories or official views, although it is not always easy to separate the substance from the rhetoric.

However, irrationalism is not a necessary option for inheritors of late nineteenth-century social thought. Writing in the 1950s about the generation of European thinkers of the 1890s and after – who included such different figures as Freud, Croce, Sorel, Collingwood and Mannheim – Stuart Hughes observed:

The question of rationality is the crucial one – the final test of what was viable and what was transitory in the intellectual labors of this generation. In defining their attitude toward reason, the social thinkers of the early twentieth century were obliged to walk the edge of a razor. On the one side lay the past errors of the eighteenth century and of the positivist tradition. On the other side lay the future errors of unreason and emotional thinking. In between there remained only the narrow path of faith in reason despite and even because of the drastic limitations with which psychological and historical discovery had hedged it: however much ‘intuition’, free association, and the other unorthodox techniques of investigation might have broadened the criteria of evidence in social thought, reason alone remained the final control and arbiter.¹⁹⁸

It was for such reasons that Mannheim talked of ‘relationism’ and that historiographers, sceptical jurists and many sociologists were so anxious to dissociate themselves from ‘extreme relativism’.¹⁹⁹ For Max Weber the tensions between rational method and subjective meaning, between ‘the sphere of logic and the sphere of value’,²⁰⁰ were central. As Hughes suggests: ‘[H]e alone invariably held to the central understanding of his whole generation. He also never wavered in his insistence that *both* reason and illogic were essential to the comprehension of the human world. While reality, he implied, was dominated by unreason it was only through rational treatment that it would be made comprehensible.’²⁰¹ Perhaps the main conclusion suggested by my own explorations is that the vast majority of ‘critical’ studies of judicial process and of other sceptical or debunking motifs listed at the start should be interpreted as posing far more of a threat to complacent rationalism than to the aspirational core of the Rationalist Tradition. Reason, Truth and Justice, as central notions of adjudication and proof, may not be under such direct attack as first impressions suggest; but they are, of course, subject to reinterpretation in each generation. To put the matter differently: few, if any, of the sample of texts studied for this essay need to be interpreted as involving an outright rejection of the *concepts* of Truth, Reason or Justice as central aspirations of adjudication, representing its ‘rational core’; however, the particular *conceptions* associated with the Rationalist Tradition are by no means the only ones to be found in our current stock of theories and, in the light of more general intellectual developments, they seem rather old-fashioned and simplistic by virtue of their roots in eighteenth-century Enlightenment thought.²⁰²

Another general lesson of this enquiry concerns concepts. ‘The field of evidence is no other than the field of knowledge’, wrote Bentham.²⁰³ It is hardly

surprising that some of the basic concepts of the law of evidence and theories of judicial evidence should be shared with other disciplines: proof, truth, facts, evidence, relevance, probability, credibility, reliability, common sense, rationality, practical reason, belief, and decision are all obvious, if not straightforward, candidates for the status of fundamental concepts of any theory of evidence. Some are, perhaps, less obvious: stock of knowledge, cognitive competence, cognitive consensus, criteria of relevance, criteria of significance, materiality, efficiency, narrative coherence for example. Philosophers of knowledge, historians, scientists, phenomenologists, probability theorists, and information scientists are among those who, in this respect, use what looks like a common language.²⁰⁴ How far such terms have shared meanings across disciplines and how far they are necessary or central in each context are debatable questions.

So far, I have suggested, the central underlying assumptions of the Rationalist Tradition have stood up rather well in the face of a series of potentially destructive or subversive intellectual trends. There are, however, some other general themes in this essay that point in a different direction. Two of the more important ones are cautionary.

First, at several points we have encountered powerful reminders of the difficulty of the enterprise of seeking after truth. Rescher, a cognitivist, readily concedes that the sceptic has managed 'to exhibit the inherent limitations of such knowledge as we can properly lay claim to'.²⁰⁵ Fischer, one of the sharpest critics of historical relativism, acknowledges that completeness ('the whole truth') is an unattainable ideal and that the obstacles in the way of accurate history are formidable.²⁰⁶ Similarly, the need for selection, interpretation and arrangements of 'facts' is almost universally accepted as an inevitable part of the writing of history. The trier of fact in adjudication may have his task simplified for him by prior definitions of what is material, by pleadings and by all the other kinds of filtering that have taken place before trial. But the tasks of selection, interpretation, arrangement and many other aspects of information-processing face legal enquiries seen as total processes; even judges and other triers of fact are by no means totally exempted from such operations. Jerome Frank may have overstated his case from time to time; his criticisms of particular institutions and devices are still controversial; but it is difficult to contest the core of truth in his identification of practical obstacles to arriving at correct decisions and the inevitability of 'the personal element' at every stage of judicial processes. Nor is there much room for disagreement about the central thesis of phenomenology that all that passes for knowledge is affected by its social environment and that, in some sense, all judgements or statements of fact are 'constructed': disagreement centres mainly on the meaning and implications of such notions. Finally, the leading exponents of mathematical analysis of probabilities are careful to acknowledge how rarely the conditions for the kinds of calculations they favour are satisfied in practice in forensic contexts. Thus in various ways these representatives of different kinds of scepticism and relativism all emphasize the complexities and the practical difficulties of fact-determination. That the pursuit of truth is a difficult enterprise deserves the

status of a truism; it is fair to say that within Evidence scholarship this has sometimes been part of ‘the neglected obvious’.

A second warning note is, perhaps, less obvious. This relates to the dangers of over-simplification. To put the matter simply: there is something simplistic about the Rationalist Tradition. This is illustrated in extreme form by its greatest scholar, Wigmore, whose view of the world looks quaintly simpleminded to modern eyes. Even Bentham, in many respects a complex and incisive thinker, espoused a form of commonsense empiricism in his approach to evidence. One example of over-simplification will suffice. The standard contrast (by lawyers) between historical and legal enquiries discussed above is based on an extraordinarily simple and monolithic view of both historiography and adjudication as enterprises. ‘The historian’ is a single character. All types of judicial process are treated as similar, jury trials tend to be seen as the paradigm; the focus is on the adjudicative decision rather than on the complex flows of decisions that characterize most kinds of legal processes. What has happened, one wonders, to such elementary discriminations – familiar to lawyers in other contexts – as the distinctions between criminal and civil procedure; between contested and uncontested cases; between jury trials, other trials, and proceedings in other tribunals; between legislative and adjudicative facts; between multi-million dollar anti-trust suits, political trials and simple consumer claims, or between private and public law litigation – to say nothing of more recondite differences? Can an adequate theory of evidence conflate all types of proceeding, all types of tribunal, all types of case and all the stages in each type of proceeding within a single model of adjudication (including its basic assumptions about evidence)? In any given jurisdiction can there be only *one* law of evidence which applies across the board, subject to a few exceptions and modifications? In the Anglo–American system can there be just one ‘typical’ or ‘paradigm’ case and if that is conceded, is the contested jury trial an appropriate choice?

Most writers on evidence give some place to some of these distinctions and modifications – especially the distinction between criminal and civil proceedings. There *may* be some justification for treating contested jury trials as paradigmatic in some contexts, even if they are atypical. The search for principle and for coherent frameworks is a worthy one. The ‘ideal type’ of the assumptions of the Rationalist Tradition is my own construction and I have, perhaps rashly, treated some quite different individuals as belonging to a single intellectual mainstream. I have also indulged in other simplifications. Nevertheless, it is worth asking whether the great bulk of writing about evidence is not seriously over-generalized and whether a theory of evidence suited to the modern temper does not need to be much more differentiated than its predecessors. These questions are pursued in later chapters. What I want to suggest here is that one important source of scepticism about some of the assumptions and claims of the Rationalist Tradition is that it has tended to adopt a picture of adjudication that is both over-simple and over-generalized. We may still wish to move towards a general theory of adjudication (or litigation) and a general theory of evidence as part of that theory, but the implications of

even the most elementary distinctions (and many others) need to be explored in a questioning spirit. There are many types of judicial processes; each type of legal process is itself an extremely subtle and complex kind of social process involving numbers of participants. The heritage of orthodox evidence scholarship does not make sufficient allowance for such complexities.

When an orthodoxy is under challenge from a number of different directions at a number of different levels it is foolish to expect or to wish for a single new orthodoxy to emerge to replace the old one. Our intellectual environment is more complex than that. The orthodoxy that I have identified as the Rationalist Tradition has an internal coherence yet it is sufficiently flexible to accommodate some important disagreements²⁰⁷ – for example, the running debate about safeguards in criminal procedure or the wide spectrum of views about the scope and justifications for deviations from a principle of free proof. By making some important concessions to the fallibility of human deciders and the practical exigencies of litigation, the Rationalist Tradition has been well protected from simplistic attack by disappointed perfectionists or absolutists. By concentrating very largely on the aspirational and the normative, it has made few empirical claims that can be directly refuted. Orthodox evidence scholarship tells us almost nothing about how the rules of evidence operate in practice, about the actual mental processes of witnesses, triers of fact or other participants, nor about any other aspects of the actual dynamics of information-processing in litigation. Although it has been less narrow and less rule-obsessed than other fields of law that have been dominated by the Expository Orthodoxy (Bentham and Wigmore have ensured that), it is *par excellence* an unempirical tradition. As such it is open to attack on grounds of narrowness, triviality and, above all, neglect of important questions, but it is less obviously vulnerable to charges of distortion, misperception and error.²⁰⁸

If some notions of Truth, Reason and Justice are worth preserving, are those versions espoused by the Rationalists the only, or the most acceptable, ones? Can this narrow focus or some of its key assumptions be shown to lead to significant error in treatment of particular topics? For example, has not ‘the problem of misidentification’ been misposed and does the orthodox literature not give a systematically misleading picture of the nature and role of confessions in the administration of criminal justice?

I have emphasized that the statement of the underlying assumptions about evidence and the Rationalist model of adjudication are both ideal types, to which the views of nearly all leading Anglo–American writers have more or less approximated. The historical thesis is thus a restricted one – the claim is that by and large these writers have subscribed to most of the elements in the scheme, though not in this specific formulation. It is an approximate reconstruction of common ideas in an intellectual tradition that is remarkably homogeneous without being doctrinaire or monolithic. That will suffice for present purposes.

In chapter 3 the main underlying assumptions of the Rationalist Tradition were articulated in the form of two ideal types, a Rationalist Model of Adjudication

(Model I) and a series of common assumptions underlying orthodox theories of evidence and proof (Model II) (p. 76).²⁰⁹ Even if it were possible to be exhaustive, it would be tedious to try to identify all possible deviations from each element in the two models. But some of the main possible strategies of different kinds of scepticism about aspirational rationalism can be quite simply depicted by restating Model II in simplified form and indicating some important variants (table 2). It is difficult to evaluate the potential significance of many of the variants in isolation from some more general theory or line of argument. Some can fairly be interpreted as particular moves or ploys or tactics that belong to a more general strategy. To return to the mapping analogy: these charts are like town plans that indicate a number of stations and other points of departure without providing much information about what destinations might be reached by precisely what routes.

From the variety of perspectives and bodies of literature that we have glanced at in these preliminary explorations, perhaps five main strategic approaches can be singled out as either presenting direct challenges to the central notions of the Rationalist Tradition or as offering starting-points for alternative theories of evidence:

- 1 *Philosophical scepticism*, that is strong scepticism about the possibility of knowledge or rational argument or objective values. Genuine scepticism at this level presents a direct challenge to *any* theory of evidence; but there are good grounds for doubting the genuineness of most claims to philosophical scepticism.
- 2 *Ideological scepticism*, that is a stance that treats the assumptions and central ideas of the Rationalist Tradition as mere ideology (usually as part of the ideology of 'liberal legalism') which wholly or largely masks a very different reality – for example, that what is presented as the rational pursuit of justice under the law is in practice part of the repressive machinery of an unjust social order. In its more moderate or more refined forms, for example in E. P. Thompson's much debated claims for the Rule of Law, some place is accorded to law as being more than mere ideology, even in a declining capitalist society. In so far as this is acknowledged, the core notions of the Rationalist Tradition may survive, albeit in circumscribed, modified or attenuated forms, in both descriptive accounts of existing arrangements and in prescriptive theories of evidence within some new social order.²¹⁰
- 3 *Nature-of-the-enterprise scepticism*, that is scepticism about claims that adjudication is about implementation of law and vindication of rights as opposed, for example, to the termination of disputes by peaceful means or the routine bureaucratic processing of people who have been unfortunate enough to fall into the clutches of the agencies of repression or social control. In its extreme forms this kind of scepticism about adjudication can barely accommodate such notions as 'miscarriage of justice', 'reliability', or even 'evidence' or 'proof' in any recognized sense. One can only remain sceptical of accounts of any legal order that allow no place for the notion of 'rectitude of decision' and its associated concepts. In more moderate forms – including accounts that emphasize the essentially bureaucratic and cooperative aspects of many so-called 'adversary' proceedings – such scepticism serves as a useful corrective against simplistic or complacent views. It is one thing to argue for the retention of notions of reason, truth and justice

Table 2. *Rationalist theories of evidence and proof, with selected variants*

Aspirational rationalism (ideal type)	Selected variants
1 Cognitivist epistemology.	Epistemological scepticism.
2 Correspondence theory of truth.	Coherence theory of truth.
3 Rational decision making as aspiration.	(a) Scepticism about the possibility of rationality in (a) any context, (b) adjudication (this cannot be the aspiration); (b) claims to aspire to rationality in adjudication are a pretence or a delusion (this is not in fact the end which is pursued); (c) some other end should be pursued (this should not be the aspiration).
4 Decisions based on relevant evidence.	(a) Relevance a meaningless concept; (b) lawyers' conceptions of relevance are unduly narrow or otherwise strange.
5 Common sense appeals to a shared social stock of knowledge about the common course of events.	(a) Scepticism about common sense; (b) scepticism about general cognitive consensus; (c) scepticism about general cognitive competence.
6 Inductive reasoning the norm.	(a) Scepticism about the possibility of rationality in (a) any context, (b) adjudication; (b) scepticism about induction; (c) mathematical (Pascalian) reasoning the only valid kind of reasoning; (d) alternative conceptions of 'rationality' (e.g. holistic rather than atomistic; Hegelian rather than Baconian).
7 The pursuit of factual truth (as part of rectitude of decision) commands a high priority (as a means to Justice under the law).	(a) Scepticism about all claims to 'truth' (cognitivist epistemology); (b) fact and value cannot be separated in normative enquiries (anti-positivism); (c) truth is (largely) irrelevant in conflict resolution; (d) the adversary system does not give a high priority to the attainment of truth.
8 Justice under the law.	(a) Ethical relativism or subjectivism; (b) other ends should be or are in fact pursued.

in adjudication, it is quite another to postulate a single direct end as an aspiration, let alone as the achievement, of so complex an enterprise as litigation.²¹¹

- 4 *Legal fact-scepticism*, that is doubt about the feasibility in practice of designing institutions, procedures and rules which will in practice regularly maximize rectitude of decision, in so far as that is an important goal of a given system; that will, for example, meet the Bridlegoose Challenge to a satisfactory standard. It is common ground that the pursuit of truth in adjudication, as elsewhere, is a difficult enterprise. There is a spectrum of views as to *how* difficult it is in various contexts. Even Jerome Frank, when one pares away the rhetoric, proves on examination to be an optimistic rationalist – in so far as he maintains a consistent posture. It is remarkable how little has been done to develop and refine Frank's central insight in a sustained and systematic fashion. Judge Bridlegoose remains the archetype of the fact-sceptic. He offers a constant and inescapable challenge to both optimistic and pessimistic rationalists. One ironic finding of this tour has been that mathematical purists are, perhaps unwittingly, the leading proponents of the view that the Bridlegoose Challenge is not, and most probably cannot be, met in practice.
- 5 *Contextualism*, that is the broad, and avowedly open-ended, thesis that for most purposes law, and particular aspects of it, cannot sensibly be studied in isolation, but needs to be set in some broader context. In respect of adjudication, a standard precept is that adjudicative decisions need to be seen in the context of total legal processes, which in turn need to be set in the context of other social processes and of some broad vision of a particular social order (and, indeed, of an increasingly interdependent world). In the present context this kind of perspective mandates scepticism of the isolationist tendencies of specialized evidence scholarship. This is not only a matter of keeping a close watch on the interactions between rules of evidence, procedure and substantive law, but also of setting the study of adjudicative decisions firmly in the context of some model of total processes of litigation and other modes of dispute-settlement. The approach also draws attention to the fact that intellectual movements in law have a close, but complex, relationship to broader intellectual trends – as should be clear from this essay.

Such elementary precepts do not, on their own, involve any necessary commitment to even quite moderate forms of scepticism or relativism at a fundamental level. Nor do they lead inexorably to rejection of specialized studies nor of such projects as drafting codes of evidence. They do, however, suggest that a theory of evidence as part of a broadened conception of law as a discipline must inevitably be integrated with some general view of dispute settlement, adjudication, procedure and much else besides. Moreover, like most of the other strategies already discussed, contextualism almost inevitably raises doubts about monolithic or simplistic views of the subject: *the* end of adjudication? *one* law of evidence? *the* judicial process? ... Since this travelogue has been written by a committed contextualist, some of the tendencies and biases of this kind of approach should be apparent in all that has gone before.

These five strategies of scepticism are clearly not exhaustive of all possible strategies. Nor are they mutually exclusive; indeed some of them can be combined in a variety of ways. They do, however, provide a rough sketch of some of the more

persistent patterns that can be discerned in the bewildering panorama presented by our intellectual heritage.

In any worthwhile expedition the tourists are exhausted before they have exhausted the sights. It is time to conclude. What is the Thursday Sceptic to make of all this? Given his lack of stamina, two final observations based on this survey will suffice: first, the individual scholar – whether he likes it or not – when confronted with so vast a heritage must accept inevitability of pluralism as a fact. Secondly, for rethinking evidence, Thursday scepticism is quite enough as a start.²¹²

* This essay was first written during 1979–82 as a sequel to the essay on the Rationalist Tradition and published in the *British Journal of Law and Society* (Basil Blackwell, 1984). It is reprinted here with the permission of the publisher. Since it is in part a report on wide exploratory reading in several disciplines, I have made only a few minor changes to the text. To have attempted to update the essay would have involved reporting on a further sample of diverse writings by Dworkin, Foucault, Geertz, Putnam, Ricouer, Rorty and, above all, Mensonge, as well as various contributions to and comments on critical legal studies, feminist legal theory and writings about the relations between law, semiotics and narratology. Had I written the essay in 1988 there would have been some differences in tone, emphasis and position. I would possibly have devoted more attention to the Hard-nosed Practitioner, nature-of-the-enterprise scepticism, the role of narrative in constructing and reconstructing reality and the interplay of fact, law and value. Under the tutelage of Philip Dawid I have also developed a more sympathetic appreciation of the flexibility of certain kinds of statistical analysis than is suggested by the text. [Some of these developments are explored in later chapters.] However, I am still prepared to stand by the central thesis, viz. that the literature sampled here (a) poses few threats to the centrality of the concepts of Truth, Reason and Justice in any theory of Evidence and Proof and Fact-finding (EPF) (or even of the broader field of Information in Litigation (IL) that is developed in later chapters), but (b) suggests that the particular conceptions and focus built into the assumptions of the Rationalist Tradition are ripe for rethinking. [Had the essay been written after 1994, I would also have felt bound to reply to critics (Nicolson (1994), Siegel (1994)) by dealing with post-modernism and the ‘pragmatism’ of legal disciples of Richard Rorty. My views on the former are explored at length in an essay on ‘Globalisation, Pluralism and Post-Modernism: Santos, Calvino and Haack’ (Twining (2000a) reprinted in *GJB* ch. 9). On recent misuses and confusions about ‘pragmatism’ see Haack (1998), ch. 2.]

1 Low (1978), 7. The reference to Peter Berger comes from his *Invitation to Sociology* (1966), 51. The whole passage is germane to the present paper:

We would contend, then, that there is a *debunking motif* inherent in sociological consciousness. The sociologist will be driven time and again, by the very logic of his discipline, to debunk the social systems he is studying. This unmasking tendency need not necessarily be due to the sociologist’s temperament or inclinations. Indeed, it may happen that the sociologist, who as an individual may be of a conciliatory disposition and quite disinclined to disturb the comfortable assumptions

on which he rests his own social existence, is nevertheless compelled by what he is doing to fly in the face of what those around him take for granted. In other words, we would contend that the roots of the debunking motif in sociology are not psychological but methodological. The sociological frame of reference, with its built-in procedure of looking for levels of reality other than those given in the official interpretations of society, carries with it a logical imperative to unmask the pretensions and the propaganda by which men cloak their actions with each other. This unmasking imperative is one of the characteristics of sociology particularly at home in the temper of the modern era.

- 2 Berger (1966).
- 3 Frank (1945; revised edn, 1953).
- 4 Rabelais, *Gargantua and Pantagruel*, chs. 37–43 (trans. Sir Thomas Urquhart, 1913).
- 5 The *locus classicus* is J. S. Mill, *System of Logic* (1973) Bk. II, ch. 3.
- 6 Hume (1748), s. 4; Rescher (1980), chs. 11 and 12. See further, below, 106.
- 7 See Twining (1980a), 51. For references to contributions to the debate see n. 166 below.
- 8 Eggleston (1983).
- 9 See e.g. Wigmore *Science* (3rd edn); Marshall (1980); Lloyd-Bostock (1980).
- 10 Above, n. 1 and works cited there. Scholarly works that explore contrasts between the ideology or rhetoric of the legal system include Blumberg (1967); Carlen (1976); and McBarnett (1981). Mere rhetorical statements that balance the ‘official rhetoric’ are commonplace in contemporary political discourse. A more sophisticated debate within Marxism about the Rule of Law as ideology has been provided by Edward Thompson’s defence of the Rule of Law in *Whigs and Hunters* (1975).
- 11 See e.g. Cross (1970), 66; and response by Field (1970), 76.
- 12 Garfinkel (1956), 420.
- 13 E.g. Blumberg (1967), 65–9; cf. Baldwin and McConville (1977), 111.
- 14 A selection of writings on plea-bargaining in England is included in Baldwin and Bottomley (eds.) (1978), 71–128. See also Baldwin and McConville (1977), 13.
- 15 E.g., Blumberg (1967), 65–9.
- 16 E.g., Blumberg (1967), *passim*.
- 17 See ch. 3 above.
- 18 See 75–80 above. On the argument about narrowness see below, 257–61.
- 19 The historical claim is stronger in respect of the epistemological and logical assumptions than in respect of the underlying view of the nature of the enterprise of adjudication, for two reasons. First, writers on evidence tend to be much more explicit about the former than the latter. Secondly, there has probably been less agreement in fact about the nature of the enterprise than about what is involved in proving facts in that context. See further above, 77.
- 20 Debunking, ironic contrasts, doubt and despair are alien to the Rationalist Tradition from Sir Jeffrey Gilbert through Jeremy Bentham to most other contemporary writers on evidence. Even Bentham at his most savagely polemical treated the Technical System of Procedure as absurd, arbitrary and outrageously unjust *because* it offended common sense, reason and utility. Bentham was not a sceptic about knowledge, values or reason and he was a rule-sceptic only in a restricted sense. His ideas on adjudication

belong to the Enlightenment in substance and spirit. As a theorist of evidence he is an optimistic rationalist, clearly within the mainstream of evidence scholarship (see further *TEBW*; ch. 2). Despite differences and disagreements, Thayer and Wigmore, Cross and Cohen, even secular natural lawyers such as Michael and Fuller belong to the same mainstream. Truth, reason and justice under the law (expletive justice) are the core concepts of the Rationalist Tradition.

- 21 One of the best studies of the intellectual history of post-Enlightenment social thought, from which many of the trends discussed in this essay emerged, is Hughes (1958).
- 22 On the affinities between Marxian and Benthamite ‘demystification’ see Hart (1973), 2; also *TEBW* 75–88.
- 23 See now ‘Manifesto of Legal Irrealist Disbelief’: Graham (1987), 1231–4.
- 24 On standpoint see Twining (1973b), 275 and below, 130–4. [cf. GJB 31–5, *Analysis* (2005) 115–17, 124–5, and Abimbola (2004).]
- 25 Cf. Bentham VI *Works*, 249.
- 26 On the notion of conditions of doubt, see Twining and Miers (1982), ch. 6.
- 27 See generally Hollis and Lukes (1982).
- 28 A brief comment on the doubts which lie behind such questions. A philosophical sceptic who doubts whether it is possible to have knowledge about the past, is likely also to be sceptical of a theory which purports to answer questions about logical aspects of proof of past facts; someone who doubts whether judicial processes are in any important sense concerned with fact-finding or truth-seeking is likely to raise a quizzical eyebrow about the worthwhileness of studying the reliability of different kinds of evidence or ways and means of improving accuracy in judicial fact-finding; someone who doubts whether historical facts can ever be objective, may raise questions about the use of terms such as ‘canons of evidence’ or ‘standards of proof’ or ‘criteria of relevance’, in so far as they imply objective or, at least, trans-subjective criteria. If ‘reality’ is merely constructed by advocates and decision makers, rather than tested on the basis of evidence, why concern oneself with questions about evidence, proof and relevance? Someone who denies the possibility of rationality in decision making is likely to question the value of the study of logical aspects of probative processes. Not all of these doubts follow from sceptical premisses as a matter of logical necessity. For example, to suggest that rationality plays little or no part in practice in legal processes does not *ipso facto* invalidate all theories of legal reasoning; but it does put one on one’s guard as to whether any particular theory contains dubious assumptions or gives a misleading impression about the part played by reason in such processes – and it raises questions about the worthwhileness of the enterprise. Someone who believes that the judgments of courts are mere rationalizations is not likely to be very interested in the logic of justification, not because he thinks that such an enterprise is invalid, but because he thinks that it is unimportant or trivial or irrelevant to his concerns. My primary concern in this paper is not to criticize the approaches under consideration. Rather this is a mapping exercise in which the main objective is to locate a variety of seemingly sceptical approaches in relation to each other and to orthodox theories of evidence and proof.

29 Twining (1978), esp. 189–92. The classic critique of polemical jurisprudence is by Karl Llewellyn:

Though

- (a) jurists are mostly lawyers, so trained in the rhetoric of controversy, with
 - (i) its selective, favorable posing of issues, and
 - (ii) its selection, coloring, argumentative arrangement of facts, and
 - (iii) its use of epithet and innuendo, and
 - (iv) its typical complete distortion of the advocate's vision, once he has taken a case, so that he ceases to even take in any possibility which would work against him (as especially in the prevalent 'romantic' type of advocacy), that
- (b) it has proved necessary to police their work as advocates by
 - (i) forcing them to define issues by a careful system of phrased pleading, served back and forth with opportunity for answer, under the supervision of a responsible and authoritative tribunal, and
 - (ii) limiting their arguments to the issues so drawn, and
 - (iii) confining the 'facts' to which they can resort to a record, and
 - (iv) barring guilt by association, or by imputation, or without proof of particular offense, etc., yet
- (c) in jurisprudence every man
 - (i) states his own issue, misstates the other man's issue, beclouds the or-any issue, evades the or-any issue, etc., uncontrolled by procedure or by answer, or by authority (and cases where a jurist has stated an issue fairly are museum-pieces), and
 - (ii) uses his rhetoric also without control, and
 - (iii) is free to dream up 'facts' even by anonymous imputation, and
 - (iv) consequently always rides his strawman down.
- (d) Whereas in law one party always loses, or each must yield something, in Jurisprudence there is thus Triumphant Victory for All. This makes for comfort, if not for light. [*Law in Our Society*, 86–7, unpublished, 1950, quoted in Twining (1973), 379–80]

30 Twining (1978).

31 Hart (1961), 135.

32 Twining (1973a), 32, 255, 408. This was written before recent debates concerning critical legal studies.

33 Other examples of alleged myths as caricatures include 'the slot-machine theory of the judicial function', 'the myth of judicial neutrality' and 'the myth of logic'. A useful function may be served in showing why a particular belief is absurd, even if it is difficult to find evidence of widespread or even any adherence to the belief (e.g. Hart's treatment of rule-scepticism); but often this kind of approach leads to sterile polemics. A recent example is J. A. G. Griffith's *The Politics of the Judiciary*, (1977) which is marred by a tendency to interpret claims to 'neutrality' and 'impartiality' unduly strictly; by choosing an unnecessarily soft target, Griffith weakens the force of his argument and has made it easy for some of his critics to avoid its main thrust.

- 34 5.5.8. *'And-Not' is bad Jurisprudence*. In observation of any social scene, the complexity of material makes any *exclusively* single attribute or sequence highly improbable. 'And-not' is the traditional bane of sound jurisprudence (and of lay thinking in general): 'Because it is A it is therefore *not B*' presupposes a thoroughly explored, exactly defined area of discussion, divided accurately and exhaustively into A and Not-A – which the current social scene almost never is. Examples: 'Good lawyers are born *and not* made.' (First half true sometimes; and *some* native capacity is indeed needed.) 'It is not law which shapes society, but society which shapes law.' (First half false; though much law has often failed to 'take'; but even then it may shape heavily in unforeseen directions: e.g. Volstead Act and gangsterism.) (Llewellyn (1950), reproduced in Twining (1973a), 516.)
- 35 See *Law and the Modern Mind* (1930), *passim*, especially ch. 1. Frank contrasts 'the basic legal myth' with fields other than law where 'there is today a willingness to accept probabilities and to forego the hope of finding the absolutely certain' (p. 7). Frank attributed belief in this myth to most members of the Bar (and possibly of the general public) and acknowledged that many jurists before him had recognized that 'Law . . . is at the best governed by "the logic of probabilities"' (ibid.). See further below, 116–19.
- 36 A number of other important concessions and caveats are typically made by aspirational rationalists within the Rationalist Tradition.
- 1 The notion of 'rectitude of decision' involves no necessary commitment to the pursuit of truth as an overriding value; it is standard to acknowledge that other values, such as the security of the state or preservation of the family or of confidential relationships, have to be 'balanced' against rectitude of decision as a social value. There is no consensus within the Rationalist Tradition about the relative priorities to be given to such competing values.
 - 2 The notion of 'fact' is recognized as problematic: the distinction between questions of fact and questions of law is notoriously difficult; it is commonplace that triers of 'fact' are often called upon to decide whether conduct was reasonable or to make other judgements involving an element of evaluation, while the paradigm case of 'fact-finding' is concerned with allegations about *particular* past events, it is not assumed that all facts in issue are particular.
 - 3 The claim that we have adopted 'the method of reason' in adjudication is a limited one. The 'method of reason' is contrasted with pure chance (Judge Bridlegoose) or brute force or appeals to the supernatural or 'the mechanical following of form' (Thayer's phrase). The claim relates to the aspiration and the design of the system; the standards of rationality are modest; it is generally accepted that closed system reasoning has limited applications and even enthusiastic Pascalians (see below) acknowledge that the conditions for pure mathematical calculation are rarely satisfied; few claims are made about the extent to which decision making in practice satisfies these standards of rationality; notions such as 'prejudicial effect' acknowledge the possible operation of irrational factors.

The core of the Rationalist claim is that the maximization of 'soft' rationality in adjudication is a reasonable aspiration.
 - 4 Emphasis on 'common sense', 'knowledge about the common course of events', 'general experience', postulates both a general cognitive competence on the part

of triers of fact and a widespread cognitive consensus within a given society – assumptions that are especially likely to attract criticism (see below, n. 136). This is an area particularly ripe for false exceptions. The assumption is that competence is general, consensus is widespread, not that either is universal. Fuzzy targets invite scatter-shot attack. Suffice it to say here that showing that people from different backgrounds may draw quite different inferences from the fact of a youth running away from a policeman hardly goes further in undermining assumptions above cognitive consensus than showing that few people believe that buses have square wheels supports them. On cognitive competence see L. J. Cohen (1983), 1; on cognitive consensus see Table 2 (140), and below, 114–15. See further Twining (1988a), 1539–41. The notion of cognitive consensus has often been implicitly challenged in discussions of jury selection, where the values of potential jurors are also perceived to be important. The following represents a fairly typical statement:

The theory underlying the core hypothesis, that the characteristics of jurors affect the decision they reach, can be stated fairly simply. A person's demographic background (socioeconomic class, race, religion, sex, age, education, and so forth) denotes a particular kind of socializing history for polemics, if only because the assumptions and notions are vague and subject to that person. If you are poor, young, black, and female, you will have been conditioned to view the world differently, to react to it differently, and to hold different attitudes compared with a person who is wealthy, old, white and male. These perceptions, attitudes, and values, in turn, help determine the decision you make as a juror. In addition to demographic characteristics, personality type (whether personality arises through genetics, psychodynamic development, or conditioning history) is thought to predispose a juror to a particular decision. If you are highly dependent on order, for example, you might be conviction-prone. It is unclear whether the theory holds that personality type determines the substantive preference one has (e.g. always wanting to be punitive) or whether it influences the way one processes the evidence (giving more weight to the government's evidence than to the defense's). Thus juror demographic characteristics, personality, and attitude are thought to have substantial impact on their decisions. (Saks and Hastie (1978), 49.)

- 5 Acceptance of the postulates of the Rationalist model does not necessarily involve commitment to 'absolute' or unattainably high standards: just as probability is substituted for absolute certainty, so notions of objectivity, competence, impartiality and rationality can be treated as relative aspirations.
- 6 In so far as members of the dominant intellectual tradition of evidence theorizing have accepted the tenets of aspirational rationalism, this has not thereby necessarily committed them to *complacency* about the operation of their own system at a given time – Bentham, for example, developed his theory of adjudication as a basis for a radical critique of existing institutions and practices. This is crucial for the central argument of this paper for two reasons: first, it is part of my argument that a rationalist aspirational theory of EPF is not incompatible with scepticism concerning complacent claims about the actual operation of a particular system –

indeed, it provides one set of standards for evaluation and criticism, and, secondly, that at least some alleged sceptics or relativists in pointing out gaps between aspiration and reality or in criticizing a particular system of adjudication or parts thereof are invoking something like the prescriptive model.

- 37 On the Hard-nosed Practitioner see further below, 220–1, 263. Another example of hard-nosed pragmatism is the claim that the law systematically begs philosophical questions about truth and proof. For example, Doreen McBarnett (1981), 12–13, cites a fairly standard statement by David Napley: ‘While therefore the doctor and the scientist are engaged in an inquisitorial pursuit in which they are seeking the truth, the lawyer is engaged in an accusatorial pursuit to see whether a limited area of proof has been discharged.’ She then comments: ‘The justification lies not in any idealism that “the truth, the whole truth and nothing but the truth results”, but in pragmatics. The courts are there not to indulge in the impossible absolutes of philosophy or science but to reach decisions – quickly.’ McBarnett’s ‘not ... but ... not ... but’ involves the same kind of contrast as is made by the disappointed idealist. Statements like Napley’s, thus interpreted, can easily be accommodated by the Rationalist Model, which explicitly sets standards falling short of certainty and ‘impossible absolutes’. The dichotomies are false: because certainty (‘absolute truth’) is conceded to be unattainable, it does not follow that the enterprise is not concerned with the pursuit of the best attainable truth; because pragmatic concessions are made to the avoidance of vexation, expense and delay, it does not follow that the pursuit of truth is not a serious aspiration or that *for this reason* adversary enquiries are qualitatively different from medical, inquisitorial or scientific enquiries all of which, in different ways, also suffer from practical constraints. If ‘fact-finding’ in adversary proceedings is fundamentally different from such other factual enquiries it is not because practical constraints dictate acceptance of standards of proof below the ideal.

One example of a theory that suggests that the pursuit of truth is not the principal aim of legal process is the satisfaction theory of Charles P. Curtis (1954) 21: ‘Justice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned.’ This view is criticized by Martin Golding, and Robert Summers, in Bronaugh (ed.) (1978), chs. 9 and 10, both of whom accept the standard view that ascertainment of truth is a necessary ingredient of justice viewed as rectitude of decision, but that truth is sometimes subordinated to other values. This Golding calls the truth-finding theory. The disagreement, such as it is, relates to the primacy or priority of seeking ‘truth’ about the actual past rather than questioning whether truth is sought at all.

- 38 I have anecdotal evidence that this may be true of some individual evidence scholars. This separation of personal belief from professional convention may indeed be commonplace: it would be strange if all common law judges had identical philosophical views about matters directly relating to fact-finding. We are, however, only interested in such disparities in so far as they actually affect the discourse and actual behaviour of professional – and other – participants in legal processes. If a textbook writer, in following convention, does not believe what he writes, that it is merely of incidental interest to a study of the convention – in this case the Rationalist Tradition.

- 39 The main works on which this section is based are: Ayer (1956 and 1961); ‘Statements about the Past’ in Ayer (1963); Ayer (1980); Popkin, ‘Skepticism’ in *The Encyclopedia of Philosophy* (1967; ed. P. Edwards), vol. 7; Rescher (1980); Trigg (1973); Unger (1975).
- 40 Unger (1975), 1; cf. 242–3.
- 41 On the notion of ‘legal truth’, see below 310–11. On substituting ‘Information in Litigation’ (IL) for Evidence, Proof and Fact-Finding as an organizing concept see below, ch. 7.
- 42 Ayer (1961), 47.
- 43 Ayer (1956), 76. For a criticism of this argument see e.g. Trigg (1973), 145ff.
- 44 Cf. Ayer (1956), 222.
- 45 Ibid., 76–8.
- 46 Ibid., 78–9.
- 47 Ibid., 81.
- 48 Ibid., 222.
- 49 Ibid., 78.
- 50 On the range of types of ‘fact’ that are the subject of dispute in adjudication, see below, chs. 7 and 12.
- 51 See above, 76.
- 52 On the relationship between Bentham’s epistemological assumptions in writing about evidence and his theory of fictions, see Postema (1983) and *TEBW* 52–66. On whether Hume himself was necessarily an epistemological sceptic, see Ayer *Hume* (1980), *The Problem of Knowledge* (1956), ch. 3: ‘Whatever scepticism Hume may have professed, there is no doubt that he believed in the existence of what may be called the physical objects of common sense’, *ibid.*, 35.
- 53 Michael and Adler may have been rather more eclectic than the others named in the text in their treatment of logic in their *The Nature of Judicial Proof* (1931).
- 54 Naess (1968); see also Unger (1973) and Lehrer (1973). On Nietzsche as sceptic, see Danto (1965), ch. 4. In jurisprudence explicit epistemological scepticism is almost unknown, but some jurists – Hans Kelsen, for example – may be viewed as relativists or subjectivists in ethics, see Kelsen (1957); Raz ‘The Purity of the Pure Theory’ in Tur and Twining (1986). The main clientele of writers on judicial evidence would tend to be impatient of abstract doubts in so far as these inhibit practical action. In order to be able to get on with the job one has to proceed as if there is a real world, as if legal argument is really ‘argument’ and as if one is pursuing rationally defensible ends by rational means, whether or not one believes this to be the case, just as Bishop Berkeley sat down on chairs, Hans Kelsen no doubt ‘reasoned’ with his wife about their political views, and committed Pascalians regularly indulge in non-mathematical ‘arguments’. A genuinely sceptical theory of evidence might be of great potential interest to theorists, but would have little appeal to practitioners. Most writers on evidence were, or wrote for, practitioners. Cf. Doreen McBarnett: ‘Adversary advocacy helps solve the philosophical problem of reproducing reality quite simply by not even attempting it. Instead the search for truth is replaced by a contest between caricatures. Advocacy is not by definition about “truth” or “reality” or a quest for them, but about arguing a case’ (1981, 16).

55 Rescher (1980), n. 39, at 249.

56 Ibid., 248–50.

57 Ibid., 249.

58 The main sources for the accounts of historiography in this section are: R. F. Atkinson (1978); Bloch (1954); Carr (1961); Danto (1985); Fischer (1970); Geyl (1955); Meyerhoff (ed.) (1959), a very useful anthology, and M. White (1964).

59 Cited Meyerhoff (ed.) (1959), 13; discussed by Geyl (1955), ch. 1, Atkinson (1978), 13–17. Cf. Nevins's defence of objectivity against the 'crude policy of deforming history to suit an ideological purpose': 'The only history that can truly nourish, inspire and guide a people over a long period of time is written in a different spirit. It is produced with a high, not a low intention; in an earnest effort to ascertain the truth objectively' (1962, 28–9).

60 See generally M. White (1964).

61 See especially Cahn (1957), 3, 5–6; Frank (1945, 1953).

62 Becker (1955), 327–40; Beard (1934), 219–29. Both are reprinted in Meyerhoff (ed.) (1959).

63 White in Meyerhoff (ed.) (1959), 189.

64 Ibid., n. 62.

65 'What then is the historical fact? Far be it from me to define so illusive and intangible a thing! But provisionally I will say this: the historian may be interested in anything that has to do with the life of man in the past – any act or event, any emotion which men have expressed, any idea, true or false, which then have entertained. Very well, the historian is interested in some event of this sort. Yet he cannot deal directly with this event itself, since the event itself has disappeared. What he can deal with directly is a *statement about the event*. He deals in short not with the event but with a statement which affirms *the fact that the event occurred*. When we really get down to the hard facts, what the historian is always dealing with is an affirmation – an affirmation of the fact that something is true. There is thus a distinction of capital importance to be made: the distinction between the ephemeral event which disappears, and the affirmation about the event which persists. For all practical purposes it is this affirmation about the event that constitutes for us the historical fact. If so the historical fact is not the past event, but a symbol which enables us to recreate it imaginatively. Of a symbol it is hardly worth while to say that it is cold or hard. It is dangerous to say even that it is true or false. The safest thing to say about a symbol is that it is more or less appropriate' (Meyerhoff (ed.) (1959), 124–5).

66 Ibid., 123.

67 Ibid., 122.

68 Ibid.

69 Ibid.

70 Ibid., 131.

71 Ibid., 125.

72 E.g. G. R. Elton on Carr (1969), 74–8.

73 Meyerhoff (1959), 143.

74 Danto (1968), ch. 6.

75 Meyerhoff (1959), 248. After summing up Beard's argument, Dray comments: 'This would appear to be a very miscellaneous set of worries, to say the least, and it is far

from evident that they are brought together with any one clear meaning of the term “objective” in mind’ (Dray (1964), 22).

76 Fischer (1970), 42–3n. Other leading critics of relativism are M. White (1964) and Danto (1985).

77 Cf. Geyl (1955), 28–9, on Leopold von Ranke:

Historicism in the sense of an interpretation of history which acknowledges no standards outside the object, is abhorrent to me. I can see that Ranke, although not a historicist in that sense, has by his influence contributed to the development of that attitude of mind. Indeed, there is in his own presentation of the past enough of amorality and passivity to give one frequent cause for impatience; and the illusionism, the spiritualizing of the brutish forces, leaves one with a feeling of dissatisfaction. Yet how admirable, nevertheless, is that serene matter-of-factness, that striving after comprehension, that openmindedness for historic phenomena other than those with which the writer himself felt in agreement – as a Protestant for the Papacy, as a German for the French absolute monarchy and for the English parliamentary monarchy, as a conservative sometimes for the French Revolution – qualities which have had a broadening effect on nineteenth century civilization and which (need I remind you?) are the complete opposite of the revolutionary fanaticism and doctrinairism of the men who half a century after his death threw Germany and the world into the catastrophe.

78 White, in Meyerhoff (1959), 197.

79 Nagel (1959), 215.

80 Fischer (1970), 42–3.

81 The following is a good example:

Essentially the law of evidence is concerned with the regulation of an investigation – that of fact-finding. This investigation is historical rather than scientific. The experimental methods of the natural sciences are not normally apt. When occasional resort is had to them, for example by the use of blood-tests or even of psychiatric evidence, this is strictly incidental to an enquiry as to past events. But to describe the fact-finding process simply as an historical investigation could be misleading: indeed, it has several characteristics which would be anathema to historians. These characteristics reflect, or should reflect, the context and purpose of the investigation. That purpose is not the mere acquisition of knowledge: it is the just settlement of a dispute. The results of the investigation have practical and often immediate consequences: they are likely to affect specifically the position of identifiable human beings. The context of the investigation is a trial, and, more particularly in common law jurisdictions, a trial conducted by adversary rather than inquisitorial methods. There are thus inherent constraints which the professional historian would find intolerable. These include the following: (1) Evidence is marshalled and presented very largely by interested persons. A party in civil proceedings and the accused in criminal proceedings is not impartial: he is concerned not so much with establishing the whole truth as with winning his case. He can within fairly broad limits decide which evidence to offer and which to withhold. (2) A conclusion has to be reached one way or another even though the evidence may be inadequate. (3) It has to be reached quickly, and in a court of last

resort it is final. (4) The tradition of trial by peers requires that the investigators be untrained. (5) The dogma that the trier of fact must fudge according to the evidence seriously restricts the liberty of the investigators to inform themselves. (6) The evidence according to which they must judge is usually itself that of a non-expert and presented in the unfamiliar and somewhat forbidding atmosphere of a courtroom.

Adjudicative fact-finding smacks then of being an historical investigation carried out by untrained investigators required to act upon non-expert sources of information presented by biased protagonists, these untrained investigators being required to reach a decision which will be final and binding, to do so regardless of the adequacy of the evidence and to do so quickly. (Carter (1981), 9–10; cf. Gulson (1905), 214; Best (1849 edn), Intro., s. 2.)

82 Ch. Perelman (1963). It is sometimes said that ‘judges decide, historians conclude’. While the central point about the differences in their roles is correct, the distinction can be drawn too sharply: historians have to make choices and judges are meant to justify their decisions on the basis of conclusions supported by reasons. Similarly, while it is no doubt the case that judicial decisions generally have potentially important practical consequences it is misleading to suggest that historians have no influence in the real world – in education and politics, for example.

83 Of course, the unique past event is the standard, rather than the universal, object of enquiry in judicial processes.

84 ‘From the epistemological point of view (also Engels wrote this) the fact that “Napoleon died on May 5 1821” is a trite truth (Plattheit), indeed, although it was a very sad or tragic fact for Napoleon and the Bonapartists. From the epistemological point of view also the truths of criminal judgment are “platitudinous truths” although they are significant, important or perhaps tragic from the social or individual point of view’ (Kiraly, 1979).

85 See Bentham, *Rationale of Judicial Evidence* (ed. J. S. Mill, 1827), Bk. I, ch. 3.

86 E.g. J. Jackson (1983), 85; Zuckerman (1986a) and Twining (1986c), 391–3.

87 Cf. the remarks of a legal historian:

... the isolation and selection of ‘facts in issue’ for trial is not of course the beginning stage of EPF, but an intermediate one quite far down the road, along which large numbers of people – legislators defining the liability, and establishing burdens of proof, the practices of bench and bar (or administrators and those dealing with them) in reducing elements of liability to certain stereotypes of proof-packages, witnesses in the particular case, their experts and their lawyers – have all been bringing to bear various interpretative theories and perspectives that have been sorting, packaging, interpreting, explaining, selecting, and, (unlike the historian, whose subjects are dead), actually impressing their own personalities on the ‘facts’. I think the process is quite a lot like that of historical reconstruction, except much *more* complex and problematic, because the institutional setting, which is rather like that of a History Workshop, has to generate history under the maddest possible conditions – e.g. as a condition of the project, some outside bigwigs have initially excluded some kinds of work-product – such as explanations based on the characters of historical actors – as unacceptable; one has to rely as

much as (or more than) most historians, on partisan witnesses; the project is interdisciplinary – i.e. it requires the services of lots of specialists in weird fields (experts) whose methodologies, interpretative schemes, and jargon are often quite alien and unintelligible to most people in the project and who keep trying to remake the rules to suit their own disciplines; the principal researchers are sworn adversaries, who *on principle* have to arrive at contrary versions or interpretations of, the facts; but who paradoxically have to stipulate for budgetary reasons to some of the more controversial ones; and who keep trying to get the major sources of evidence to change their stories, etc. All this without even mentioning the complexities of fact-selection, interpretation, and explanation in the appellate opinion. The project therefore seems like a quite elaborate collective one in the construction of reality – the analogue to the historian is not just the decision-maker (judge or jury), but the whole crowd – lawyers, parties, witnesses, judge, jury – *not* excluding the lawmakers, who have set up the basic criteria of relevancy by defining the liability, setting up proof burdens, and establishing some basic canons of proof. (Robert Gordon, private communication to the author, 1983.)

- 88 The main sources for this section are: Frank (1930); (1933); (1938); (1942); (1945, revised 1953); (1947); (1953, in Ratner, ed.); (with Barbara Frank, 1957); Ackerman (1973); Cahn (1956–7) and (1967), 269ff.; Paul (1959); Schuett (1957); Volkomer (1970). See further the entry on Frank (by the author) in Simpson (ed.) (1984a).
- 89 Frank (1949), *passim*.
- 90 For figures for England and Wales, see Zander (1980), chs. 1 and 2, updated in the 5th edn (1988).
- 91 See further, ‘Taking Facts Seriously’, above, ch. 2.
- 92 Frank (1949), 20; cf. *ibid.*, 62.
- 93 Volkomer (1980), 18.
- 94 W. Seagle, cited by Volkomer (1980).
- 95 In addition to his critics, this seems to be true of Cahn, Volkomer, Schuett, and, perhaps, Rumble. Exceptions include Bruce Ackerman, Robert Summers and Zenon Bankowski (1981).
- 96 Volkomer (1980), ch. 2.
- 97 Rescher (1980), 3.
- 98 Volkomer (1980), ch. 6.
- 99 Frank (1945), n. 88.
- 100 Schuett (1957), at 29.
- 101 Frank (1943), chs. 12 and 13.
- 102 *Ibid.*, v.
- 103 Frank (1949), ch. 3, at 29.
- 104 Frank (1930), xvi; cf. *ibid.*, ch. xii; (1949), ch. iii; (1945, revised 1953), *passim*.
- 105 Frank (1943), 175.
- 106 *Ibid.*, ch. 2.
- 107 See especially Frank (1949).
- 108 Above, 107–8.
- 109 E.g., Frank (1949), 6.
- 110 Frank (1956), 921–4.

- 111 Frank (1930), xxviii.
112 Frank (1949), 6.
113 See especially *ibid.*, **ch. 12**.
114 E.g., *ibid.*, ch. 32.
115 *Ibid.*, ch. 3.
116 *Ibid.*, 23–4; on stories see chs. 10 and 11.
117 There is a useful list of Frank’s principal targets in *Courts on Trial* (1949), ch. 31.
118 E.g. Frank (1949), ch. 1.
119 Frank (1930), 266.
120 *Ibid.*, 268n.
121 Frank’s prescriptions tended to be rather tame in comparison with his diagnoses; see, for example, *Courts on Trial* (1949), 422.
122 See Twining (1973b).
123 The main sources for this section are: Bennett and Feldman (1981); Berger and Luckmann (1967); Binder and Bergman (1984); Cicourel (1973); Freeman (1978), Hollis and Lukes (eds.) (1982); Luckmann (ed.) (1978); Mannheim (1936); McBarnett (1981); Turner (ed.) (1974).
124 Aristotle, *Nichomachean Ethics* v (vii), 2.
125 Marx’s epistemology was never fully developed, but he was committed to the existence of a world independent of man’s knowledge of it. See Plamenatz (1975), 78–9. Cf. V. I. Lenin:
1 Things exist independently of our consciousness, our perception, outside us ...
2 There is no difference whatsoever, and cannot be, between the phenomenon and the thing in itself we have not yet come to know...
3 We must cogitate dialectically in epistemology just as in any other field of science, that is to say we must not assume that our cognition is complete and unchangeable; we must examine how knowledge arises from ignorance, how incomplete, inaccurate knowledge turns into more complete and more accurate knowledge. (*Materialism and Empiriocentrism*, cited by Kiraly (1979), 67.)
Kiraly’s work contains a useful survey of continental writings about ‘the doctrine of truth in criminal procedure’.
126 Berger and Luckmann (1967), 22.
127 *Ibid.*
128 *Ibid.*, 13.
129 *Ibid.*, 15.
130 *Ibid.*; cf. 26.
131 See esp. Introduction, *passim*.
132 *Ibid.*, 26–7.
133 E.g. Cross (1979), 17.
134 This is the view taken by Michael and Adler and others. Some, like Cross, maintain that evidence has to be ‘sufficiently relevant’, thereby incorporating other tests. The difference is probably one of semantics, not substance.
135 Berger and Luckmann (1967), 56. Bentham also uses the term ‘stock of knowledge’.
136 Cohen (1977), 274–5; criticized in *TEBW*, ch. 3; cf. Binder and Bergman (1984), 88–9.

- 137 Berger and Luckmann (1967), 16.
- 138 Ibid., 170; cf. Berger (1966), 55, 170.
- 139 Berger (1966), 41.
- 140 This theme is elaborated in Twining (1973a), 275.
- 141 See, for example, the papers by Cicourel, Garfinkel, Zimmerman and Weider in Turner (ed.) (1974), Part III; cf. J. M. Atkinson (1978).
- 142 This is a theme of Trigg's *Reality at Risk* (1980) in which he argues the case for realism, and especially the notion of 'objectivity': 'There is a fundamental divergence between those who wish to "construct" reality out of man's experience, concepts, language or whatever, and those who start with the idea that what exists does so whether man conceives it or not' (vii). My own view is that at least some of those who apply 'constructionist' approaches to law do not need to commit themselves to the kind of position that Trigg criticizes but, as we shall see, they make statements that are vulnerable in this respect.
- 143 Freeman (1978).
- 144 Ibid., 9.
- 145 Ibid., 13.
- 146 Garfinkel (1956), 420.
- 147 E.g. Freeman (1978) at 11.
- 148 Ibid., 13. See further on 'mistakes' and miscarriages of justice, below, 331 n. 148.
- 149 Ibid., 15.
- 150 For a more balanced treatment, see Binder and Bergman (1984). See below, ch. 10.
- 151 An example of a potentially illuminating study that is marred by grossly underestimating the sophistication of orthodox views of legal process is Bennett and Feldman's *Reconstructing Reality in the Courtroom* (1981). The authors claim that 'the use of stories to reconstruct the evidence in cases casts doubt on the common belief about justice as a mechanical and objective process' (Preface). This is to pick a rather soft target for attack and does not do justice to the sophistication of the legal literature on the subject. Bennett and Feldman are careful not to deny any place to empirical standards for evaluating evidence; rather they argue that stories serve as aids to selecting from a superfluity of information and to filling in gaps in that information; stories provide frames of reference for evaluating and interpreting evidence in terms of completeness and consistency. Unfortunately the authors did not direct their attention to the standard accounts by lawyers of how the problems of selection, incompleteness and inconsistency are supposed to be tackled. In particular, by ignoring almost entirely such lawyers' notions as facts in issue, materiality, relevance, burdens of proof, presumptions and, most surprising of all, the advocate's notion of 'the theory of the case', they fail to reach a point where issue is squarely joined with standard legal accounts. On stories, see further below, ch. 7.
- 152 That an empirically oriented 'constructionist' approach to legal process need not talk past traditional, unempirical writings by lawyers is illustrated by Doreen McBarnett's valuable study, *Conviction* (1981). McBarnett argues that there is not merely a gap between the law in action and the law in books, but an even more significant gap between the detailed rules of evidence and procedure and what she calls 'the rhetoric

of justice'. I find her main argument quite persuasive, but the book is not entirely free from the kind of rhetorical exaggeration that she imputes to the official ideology. On the basis of a literalistic reading of selected passages in *Conviction* one might construct a set of propositions which provide what looks like a striking contrast with the core assumptions of the Rationalist Tradition: truth and reality are subjective and relative; conceptions of reality are multifaceted and unbounded; facts are constructs, as simple or as complex as lawyers make them; in the adversary system advocates are not concerned with 'truth', but with arguing a case – an edited version of reality, constructed from diverse sources, filtered through simplifying concepts such as relevance, standards of proof and facts in issue, and manipulated and organized into a persuasive argument and presented to the trier of fact in an acceptable form; the task of the latter is not to enquire into the truth, but to choose between two 'cases', caricatures of morality constructed and presented as competing versions of reality. 'Both in its concepts and its form the legal system copes with problems of proof and truth by redefining them.' The strength of a case is a function of the technical skills of lawyers, the resources available to each party, and 'the structural opportunities and limitations' offered by the legal system rather than of something inherent in the original situation that is purportedly being reconstructed. In this view, truth, justice and reason are part of the rhetoric of the system that is reflected neither in the detailed rules nor in the actual practices of the courts.

This reconstruction of McBarnett's view, although it follows closely the language of the text, also smacks of caricature. Indeed, it would be difficult to make much sense of McBarnett's perceptive study if she were seriously committed to any strong version of any of the three kinds of philosophical scepticism discussed above: in her own descriptions she needs some notions of information, facts, accuracy, truth, proof, and science; as a sociologist her primary concern is more with understanding than with evaluation; but the very eloquence of her advocacy suggests a degree of commitment that sits uneasily with nihilism or an extreme form of ethical relativism; indeed, it is far from clear that she rejects the values embodied in the liberal democratic notions of justice which, in her view, the system fails to honour in its rules or practices.

153 Rabelais, *The Heroic Deeds of Gargantua and Pantagruel* (1542–52, Sir Thomas Urquhart's translation), Bk. 3, chs. 39–44.

154 *Ibid.*, ch. 39.

155 *Ibid.*, ch. 40.

156 *Ibid.* Sir Richard Eggleston, who may take credit for reminding us of Judge Bridlegoose, interprets Bridlegoose as 'putting himself under divine guidance which revealed itself in the fall of the dice' (1983), 1. It is true that Epistemon suggests, as a possible justification for the Bridlegoose Method, that the hand of Providence may reveal itself in the fall of the dice, but I favour a secular interpretation of the Judge's own view of the matter.

157 W. F. Smith (1918), 130–1; cf. Rabelais (1542–52), chs. 11–14.

158 *Ibid.*

159 In interpreting the Bridlegoose Challenge it is important to remember that it is not necessary that each side should have an even chance of winning; *semble* in civil cases this was the judge's measure. Thus Bridlegoose can accommodate policies

favouring one kind of error over another, e.g. preferring acquittal to conviction of the innocent.

- 160 E.g. Eggleston (1983), 1–2; Ellman and Kaye (1979).
- 161 On the conditions for the application of the calculus of probability generally, see Finkelstein (1978), ch. 1; Eggleston (1983), *passim*, esp. ch. 2.
- 162 It may be objected that it is a fallacy to assume that the prior probabilities in litigation are equal. Legal procedures are designed to filter out frivolous or groundless claims and charges, with the result that for any case that comes to trial the prior probabilities are not equal: few plaintiffs will ever get into court without any evidence to support their allegations; similarly most people who are prosecuted are in fact guilty. To which Bridlegoose might reply: ‘First, what empirical evidence do you have to support such statements? Show me! Secondly, the rules of your system, as exemplified by burdens of proof, standards of proof and presumptions, frequently prescribe that the case should be decided *as if* the prior probabilities are even or, as in the case of the presumption of innocence, that the prior probabilities are to be treated either as equal or as favouring the defence, *despite* your claim that most people who are prosecuted are in fact guilty. Thirdly, if you wish to challenge the assumption that the prior probabilities should be treated as evenly balanced, please show me an agreed alternative basis for establishing the priors. Finally, it is not necessary for me to make such an assumption. In the circumstances of Mirelingues, it seemed to me to be a reasonable assumption to make. However, the rules for judging by the dice could be adjusted to fit different assumptions about prior probability, if only I knew what these assumptions were.’ I am not concerned here to evaluate the validity of these arguments. It is sufficient for present purposes to show that there is scope for disagreement among reasonable men about what assumptions should be made about prior probabilities in evaluating evidence. Indeed one may ask whether doubts and difficulties surrounding the topic of prior probabilities do not reveal a chink in the armour of the Rationalist Tradition? On prior probabilities, see especially Kaye (1980); Tribe (1971) at 1368–70; Finkelstein, (1978) at 295–8.
- 163 See Kaye (1980), 601 for a critique of the notion that the ‘more probable than not’ standard equalizes errors between plaintiffs and defendants.
- 164 See above, n. 159. For the case against quantification of the standard of proof in criminal cases see Tribe (1971), 1329.
- 165 In the case of Toucheronde Bridlegoose conceded that one condition for the application of the doctrine of chances was not satisfied: he could not be relied on to read the dice correctly; but infirmity was a complete defence to such transgressions. W. F. Smith (1918), 130–2. Before examining this challenge in the light of recent debates about probabilities it may be useful to anticipate some obvious objections.

First, it may be asked, why should we take Bridlegoose seriously: Rabelais was a satirist who wrote with his tongue in his cheek; he is thought to have been arguing for appeals to broad principles rather than obscure and arbitrary technicalities. His own assumptions are quite compatible with aspirational rationalism. A simple answer is that there are some contemporary arguments that at least *prima facie* appear to lead to positions very close to Bridlegoose’s brand of scepticism. Furthermore, Bridlegoose presents a direct challenge at a fundamental level to claims that we have

a rational system of adjudication: 'Show me,' he says, 'that it is rational and that it is likely to produce better results in practice than throwing dice.'

Secondly, it may be objected, the doctrine of chances is not the correct aspect of the calculus of probability to apply to judgements of probability in forensic contexts; in most cases, it is Bayes' Theorem, or statistical calculations of frequency or some theory of subjective probabilities or wagering theory which is applicable. This objection is based on a confusion between using mathematics as the basis for reasoning towards (and justifying) probability judgements and throwing dice *instead* of 'reasoning'. The Bridlegoose challenge is that throwing dice ensures a higher probability of reaching correct *results* than do so-called 'rational' methods, irrespective of which theory of reasoning is espoused.

Finally, it may be objected, there are insuperable methodological and practical obstacles to testing the accuracy of the results of any system of adjudication. This objection may take several forms. One version is that a legal system sets its own standards and procedures for ascertaining 'legal truth'. There are no external methods for assessing the truth or accuracy or reliability of its findings. Truth is *determined* by adjudicative decisions; so long as the rules have been observed, what is determined to be true is true for this purpose.

A second version accepts that there are in theory external criteria for evaluating the accuracy or probability of adjudicative decisions – for example, by using the methods of historians to assess the probable historical truth of particular judicial determinations of fact. However, it is argued, no practicable method has yet been devised for making such assessments except in a few isolated cases. Thus we may come to the conclusion that as a matter of historical fact it was not James Hanratty who killed Michael Gregston, but no means has been or is likely to be devised for assessing the general reliability of adjudicative decisions by such criteria. I happen to think that such views are mistaken, but I shall not explore the reasons here. The relevant point in this context is that they constitute a refusal to meet Bridlegoose's challenge in its empirical aspect. The judge says: 'Show me that your method produces better results than mine.' The objector says: 'That is not possible.' 'Exactly,' says the judge, 'I have statistics on my side; you merely have faith in something you call Reason.'

166 Kaplan (1968); Finkelstein and Fairley (1970); see also Finkelstein (1978); Tribe (1971); Eggleston (1983); Cullison (1969). Earlier discussions include Ball (1961) and Ekelof (1964). For a bibliography see *FL* (1983), 156–7.

167 See generally Eggleston (1983).

168 L. J. Cohen (1977); (1980a), 91.

169 Williams (1979a and b) (Parts I and II); Eggleston (1979), 678; L. J. Cohen (1980a); Williams (1980).

170 See above n. 166 and 1 Wigmore *Treatise* (Tillers rev. 1983), s. 37. See further Tillers and Green (1988).

171 R. F. Atkinson (1978), 67–8.

172 Finkelstein (1978), 63.

173 *TEBW*, ch. 3.

174 Finkelstein (1978), 63.

- 175 This is hinted at by Tillers (1983), n. 170. A different line of reply to Bridlegoose is suggested by Marcus Singer in discussing the censure of Judge William H. (Hawk) Daniels of Baton Rouge for flipping coins to determine verdicts, ‘Judicial Decisions and Judicial Opinions’ (1983, 22–3):

Many judges have indicated that they would like on occasion to be able to decide cases in this way, and some have written learned articles extolling the advantages of the hunch or of guessing as a method of getting a just decision. Judges who write this way about the practice of deciding cases and issuing opinions do not noticeably write fewer opinions than those who hold an opposite view, and that such a view has not had any appreciable effect on their actual practice is something to marvel at.

- But let it be known – widely known – that judges decide cases regularly by flipping coins, and what will happen to the legal system? To answer this, we have to consider again the functions of courts of law, in the context of considering the aims of a legal system and why a legal system has courts of law. It is not enough for a legal system merely to decide cases. If it were, there would be nothing that could be said against deciding them by flipping coins. The second, third, and fourth functions I suggested – to interpret the law, to fill in the interstices in the law, and to determine legal validity – can be put aside in the present context as not essential to the functions of a court of law, though the second and third clearly are essential in a legal system considered as a whole. But it is not enough, as I have just said, simply to decide cases. It is also necessary, fifth, to decide cases *in accordance with justice*, and, sixth, in such a way as to *satisfy the public sense of justice* – that is, so that it will be generally believed, and for good reason, that cases are being decided in accordance with justice, or at least that an honest attempt is being made to settle cases in accordance with justice. But this means that it is being taken for granted, as an item of public faith in the society, that an honest attempt is being made to settle cases *on their merits*, and this presupposes, on the one hand, that there are merits, and, on the other, that these merits can be ascertained. A legal system in which cases are known to be decided by such methods as flipping coins could not long meet the condition of satisfying the public sense of justice, because it could not meet the condition of deciding cases in accordance with justice, and it would be known that it could not meet that condition. Knowledge of the practice would be a signal that either judges did not believe that cases had merits, or did not believe that they could ascertain them if they did, or did not believe that it was worth the trouble to ascertain them if they could. But people who want their day in court do believe, and very strongly, that their cases do have merits; the net result would be a crashing loss of confidence in the legal system.
- 176 ‘Standpoint’ and related notions are considered in more detail in Twining (1973a), 275 and Twining and Miers (1982), *passim*, esp. 64–71, 117–18, 172–83, 218–19.
- 177 Hart (1961), esp. 55–6, 86–8. The link between Hart’s ‘internal point of view’ and the so-called hermeneutic approaches of social theorists such as Weber and Winch as well as philosophers (notably the later Wittgenstein and J. L. Austin) is admirably portrayed in D. N. MacCormick (1981), ch. 3.
- 178 Discussed in works cited above, n. 176.
- 179 Rawls (1955), esp. 6–7.

- 180 Twining and Miers (1982) at 286–91 [see now Twining and Miers (1999) at 335–8].
- 181 Discussed in Twining (1973a), 294–5.
- 182 There are some notable exceptions, e.g. for a discussion of relevance in sentencing, Streatfield (1961), paras. 267–70; Shapland (1981). Once again, Bentham was ahead of his time. See his treatment of indicative evidence (evidence of evidence) in VI *Works* 214; VII *Works*, 164–5. The importance of standpoint in constructing arguments about questions of fact is developed in *Analysis*.
- 183 The distinction between participants and observers is emphasized by Harold Lasswell, Myres McDougal and their associates in numerous writings. See, for example, McDougal and Reisman (1981), chs. 1 and 3. See below, n. 188.
- 184 For examples of the breakdown of the distinction see, for example, Jacobs (ed.) (1970); Wilkins (1964).
- 185 However, expository works do not necessarily take much account of the needs of practitioners nor of desirable educational objectives for law students. See further Twining (1973b), 293–9.
- 186 Within the category of participant-oriented theories a number of further rough differentiations can be made. First, a distinction may be drawn between ‘design theories’ and participant working theories (see further above, n. 36). The former deal with the design of the system as a whole or with particular aspects of it and are addressed to the legislator; the latter make recommendations to participants about ways of operating within a given system; such recommendations may relate to ways of furthering the objectives of the system, to what constitutes good practice (which typically contains a mixture of normative and prudential elements) or purely prudential advice on how to further one’s own ends within the system, whether or not it furthers the ends or values of the system (e.g. tactical advice to advocates on how to use objections to break the flow of an opponent’s examination or cross-examination). Much confusion arises in legal discourse because the theoretical objectives of the adversary system (on one view, to maximize rectitude of decision through disputation) are sometimes conflated with the objectives of partisan participants (to win). For example, the Hard-nosed Practitioner who claims that the trial is a game or his role is to win on behalf of his client may or may not be challenging ‘truth theories’ of the adversary process; if he is, it is not always clear whether the criticism is that the adversary system is a bad means of achieving rectitude of decision or that it is naive or hopelessly optimistic or just plain wrong to postulate rectitude of decision as the primary objective of a system of adjudication (from the standpoint of the legislator). More commonly what is meant is that the practitioner’s objectives are different from those of the system.
- 187 E.g. Campbell and Wiles (1976), 547–78.
- 188 Lasswell and McDougal claim to adopt the standpoint of ‘the observer’ and to be constructive, rather than critical (e.g. Lasswell and McDougal (1967)); see n. 183 above. However, many – including the present writer – are sceptical of this claim. See further, Tipson (1974), 577–80.
- 189 Above, 92–3; cf. the difficulties for inter-disciplinary cooperation between members of a traditionally ‘scientific’ discipline like psychology and of a participant-oriented discipline like law.

- 190 That information is ‘constructed’ and ‘processed’ in litigation and other legal transactions is not quite such a new idea as sociological writers sometimes appear to suggest; witness, for example, the more sophisticated historical treatments of the use of the forms of action or Bentham’s discussion of pre-appointed evidence. However, assertions of the kind that a witness’s story or ‘version of reality’ has been ‘transformed’, ‘translated’ or ‘distorted’ in court proceedings need to be dissected carefully. A particular witness may have information (a) that is clearly irrelevant to the enterprise, judged by the criteria of relevance of each side and of the court; (b) that only deals with one small aspect of some broader picture, the prosecution’s ‘theory of the case’, the jury’s attempts to piece together the whole story or, more analytically, the evidence bearing on the facts in issue; (c) that is relevant to the facts in issue (or the prosecution’s case or whatever), but is not so perceived by the professional participants; (d) that could be perceived as relevant by all concerned, but the witness is inhibited or prevented from providing it by some contingent feature of the proceedings, with the result that the witness is not given the opportunity to present the information or fails to produce it (because he or she is overawed or confused or inarticulate) or produces it, but what is said is misunderstood or distorted or its significance (in the system’s own terms) is overlooked. It is also worth remembering that documentary evidence is less susceptible than oral evidence to such ‘processing’, and that provisions for pre-appointed evidence are intended specifically to minimize this kind of problem.
- 191 See further, Twining (1973b).
- 192 See further, Twining and Miers (1982), 346–7.
- 193 On ‘rectitude of decision’ as an aspiration for all official decision making, see below, 215–16.
- 194 Mehan and Wood (1975), 68, cited in Trigg (1980), x.
- 195 *Ibid.*, xvii.
- 196 I have argued elsewhere that where there is leeway for different interpretations of a case or a statute, the appropriateness of one of a number of possible interpretations is in large part a function of the role and objectives of the interpreter. In the same case a cautious solicitor and a bold barrister, both representing the same client at different stages, may each argue for wider or narrower interpretations of some rule; because the role of the solicitor is often to advise within a margin of error, while the role of the barrister in court is to argue in order to win. To suggest that different interpretations are appropriate for different participants, within the leeways of a range of possible interpretations, involves no necessary commitment to the view that there is never one correct interpretation for all participants. If the rule is clear the cautious solicitor, the bold barrister and even the tricky unhappy interpreter may all be stuck with the same interpretation. See Twining and Miers (1982), 171–81.
- 197 See below, 262–5.
- 198 Hughes (1958), 430.
- 199 Berger and Luckmann (1967), 21–2.
- 200 See generally Hughes (1958), ch. 8.
- 201 *Ibid.*, 431.

- 202 The distinction between ‘concept’ and ‘conception’ is usually attributed to Gallie (1956). It has been employed to good effect by jurists, e.g. Hart (1961), 155–9; Dworkin (1977), 134–7. See also Rawls (1972). In his very interesting critique of *TEBW*, Professor Dennis Galligan overlooks this crucial distinction when he states: ‘Also, it is puzzling to see the Rationalist Tradition advanced as a product of a particular view of rationality which was established in the eighteenth century; it seems rather to be based on the view of rationality common to Western civilization’ (Galligan (1988), 264). He goes on to suggest that the only alternative is ‘irrationality’ or some version of scepticism. My argument was rather that the Rationalist Tradition adopted a particular conception of what constitute valid, cogent and appropriate arguments about questions of fact in legal contexts. That conception is broadly associated with Locke, Bentham, J. S. Mill and their successors. The main alternative considered in these essays relates to ‘holistic’ conceptions of fact-determination – which can be related historically to such varied thinkers as Hegel, the Scottish common sense school (see Glassford (1820), 77), Quine, Rorty and possibly Habermas. One does not need to trespass too far into a philosophical minefield to suggest that there is more than one conception of rationality abroad in our intellectual heritage. Far from being ‘startling’, this seems to me to be a modest claim. A bolder, less culture-bound approach, might take Clifford Geertz’s *Local Knowledge* (1983), ch. 8 as its starting-point, e.g.:

And: other marketplaces, other *Anschaungen* . . . such [legal] sensibilities differ not only in the degree to which they are indeterminate; in the power they exercise, vis-à-vis other modes of thought and feeling, over the processes of social life . . . or in their particular style and content. They differ, and markedly, *in the means they use – the symbols they deploy, the stories they tell, the distinctions they draw, the visions they project – to represent events in judicable form.* (Geertz (1983), 175, italics added.)

Within our own legal culture, like Galligan, I am sceptical of most claims to philosophical scepticism that have been made by or about Anglo-American jurists; unlike him I am not convinced of the adequacy of the particular conception of rationality embodied in the Rationalist model.

- 203 *An Introductory View of the Rationale of Judicial Evidence*, VI *Works*, 5.
- 204 Many of these terms are recognized as problematic in more than one discipline; some may even rank as ‘essentially contested concepts’. Within the discipline of law there is an extensive and, in some respects, rewarding literature on such difficult notions as ‘fact’, ‘relevance’ and ‘probability’. Moreover, a highly sophisticated apparatus of concepts and distinctions has been developed, largely by judges and writers on evidence: standards of proof, presumptions, burdens of proof (and of persuasion), materiality, admissibility, conditional relevance, legislative facts are leading examples. My impression is that only classical and modern rhetoric has so rich a heritage of carefully analysed terms. Yet we have a near-paradox. For this conceptual sophistication owes very little to orthodox jurisprudential analysis. By and large the attention of analytical jurists, as reflected in textbooks on jurisprudence and the work of modern leaders of the field, such as H. L. A. Hart and Joseph Raz, has been directed elsewhere. The major exception, the notion of ‘fact’, is typically considered in the rather confined contexts of distinctions between fact and value, and fact and law. By

and large, the theory of judicial evidence and its basic concepts have been neglected by mainstream legal theory. There is a simple explanation for this neglect. Orthodox analytical jurisprudence followed the Expository Orthodoxy in concentrating very largely on rules, on private law and on disputed questions of law. ‘Legal reasoning’ was concerned hardly, if at all, with disputed questions of fact or with the nature of argument and justification relating to other decisions in legal processes. Similarly, legal theory has had fruitful links with ethics and political theory, but has paid far less attention to the philosophy of mind and the philosophy of knowledge (including the philosophy of science and of history). It has been fashionable in recent years to dismiss analytical jurisprudence as old-fashioned, trivial and sterile. A broadened conception of law as a discipline cannot afford to dispense with conceptual analysis: rather it needs to insist that attention should be directed to elucidating and refining a much broader range of concepts. In developing its concepts evidence scholarship did rather well with at best spasmodic help from mainstream legal theory. Recent developments, as exemplified by the debate about probabilities, suggest that philosophers and legal theorists may be more willing in future to give sustained attention to the field of evidence.

205 Rescher (1980), discussed above, 109.

206 Fischer (1970), discussed above, 113.

207 Galligan (1988) is particularly good on the coherence of the tradition.

208 On distortions see Twining (1984a), 281–2, and below, chs. 5 and 11. Silence has been the main strategy of defence by the Expository Orthodoxy against challenges by those who, in different ways, seek to broaden the study of law. It is an effective line of defence for a tough, coherent, well-established way of treating a subject. One response to silence is Ignoring. In polemical jurisprudence one debates with one’s friends and talks past one’s enemies. But there is far too much of potential value in the heritage of our literature on evidence for that to be a sensible option.

209 The two models can also be viewed, independently of any specific historical claim that is made about them, as a convenient heuristic device for mapping at a fairly general level a range of possible divergent views. The models were deliberately constructed in different ways. The statement of assumptions (Model II) was formulated in terms which kept as close as possible to recognizable positions of leading writers on evidence. The Rationalist model of adjudication (Model I), on the other hand, draws heavily on Bentham who in some respects took an extreme position. It is broken down into elements which consciously signal possible points of departure. It might be said to be deliberately provocative. One reason for this difference of treatment was that by and large the underlying assumptions of Model II are more clearly assignable to most writers on evidence and are subject to less controversy than those of Model I.

210 Dave Campbell has pointed out to me that the prevailing ideology and class-based pressures, in a society such as our own, can be interpreted as creating a situation in which there are competing versions of reality, but such an interpretation involves no commitment to philosophical scepticism.

211 John Jackson has suggested that it may be useful to isolate another kind of scepticism: perhaps a combination of ‘nature-of-the-enterprise scepticism’ and ‘legal fact-scepticism’, which claims that legal inquiries are qualitatively different from

other fact-finding inquiries because there are so many goals and values apart from truth-seeking in the legal inquiry. The claim is *not just* that pragmatic concessions are made to avoid vexation, expense and delay in the legal inquiry, since concessions like these and others are made in many inquiries, but that certain conflicting goals and values (for example demands for speedy final settlement, 'having one's day in court', 'winning', 'due process', lay participation in decision making, etc.) are such a part of the legal inquiry that the pursuit of truth is necessarily compromised. The view is of a pessimistic rationalist who claims that these conflicts of value cannot be satisfactorily or rationally resolved until there is some *agreed* method of resolution, which there is not at present because the participants within the system, taking different standpoints, and observers outside, cannot agree on priorities. (Personal communication to the author, February 1984.)

If this essay had been written in 1988, I would have said more about 'nature-of-the-enterprise scepticism' and in particular the significance of institutional design, the manifest and latent functions of litigation and its uses by and consequences for different actors in different contexts.

- 212 Acknowledgements. In the long period of the gestation of this paper I have incurred more debts than can appropriately be acknowledged. Subject to the normal disclaimers about responsibility, I am particularly grateful to all those who contributed to discussions in seminars in Edinburgh, Kent, Miami, Warwick and Wolfson College, Oxford, and especially to Terry Anderson, Zenon Bankowski, Dave Campbell, Ken Casebeer, Richard DeFriend, Bob Gordon, John Jackson, Doreen McBarnett, Neil MacCormick, Christopher McCrudden, David Miers, Robert Stevens, Larry Taman, Peter Tillers and many other colleagues and friends for helpful criticisms and suggestions.

Identification and Misidentification in Legal Processes: Redefining the Problem*

In recent years the problem of misidentification, especially in criminal cases, has attracted a good deal of attention from the media, lawyers, psychologists, and others. One influential, but by no means universally held, view of the problem might be stated in some such terms as these: from time to time an innocent man is convicted by a jury of a crime he did not – or probably did not – commit, on the basis, mainly or entirely, of eyewitness testimony relating to identification. Typically this testimony is honest, but mistaken. It may be only half-a-dozen or so chaps a year who suffer such miscarriages of justice, and some of these are professional criminals who might well have been put inside for some other offence; no system of criminal justice can be expected to eliminate all mistakes, but our legal tradition and public opinion place a high value on safeguarding the innocent, even at the price of letting some, but not an unlimited number, of criminals go free. The problem peculiar to identification is that the value of the evidence is exceptionally difficult to assess. The task is to reduce the risk of error by taking measures to improve the law and procedure governing *evidence* of identification. In this view the main relevance of psychology to the problem of misidentification is thought to relate to the cognitive processes of individual witnesses (notably perception, attention, memory, bias, and suggestion) rather than to cognitive processes of other participants and interactive aspects of legal processes.

The purpose of this essay is to suggest that this orthodox view presents an artificially narrow definition of the problem and that future research and public debate about the problem of identification in legal processes would benefit from being set in the context of a comprehensive model of legal processes, and of a clearly articulated integrated, theoretical framework; that information about the identity of a person or persons thought to be involved in some event or situation has a bearing, not solely on adjudication of guilt or innocence, but on a wide variety of decisions each of which may have potentially harmful or unpleasant consequences for persons who are objects of identification; that such information needs to be regarded not only as evidence, but also as potential evidence and as information relevant to other decisions; and that the ways in which it is ‘processed’ and used and the operation of factors which affect its reliability or completeness (or other ‘validity’) need to be considered at every stage in the process. Finally, I shall argue that redefining the problem

of misidentification in this way raises questions about the scale and distribution of the phenomena as they have been perceived in the Devlin Report on Evidence of Identification in Criminal Cases¹ and the debate surrounding that report.

The essay proceeds as follows: In the first section I shall consider the implications for perceptions of the problem of identification of adopting one of two different perspectives, which can crudely be designated as ‘expository’ and ‘contextual’ approaches to law. I shall argue that there are certain general tendencies and biases in the expository tradition that are reflected in part in the standard legal literature on the law of evidence, in contrast with most contemporary writing about legal processes which tends to be more in tune with a contextual approach; and I shall examine the extent to which these biases are found in the literature on identification. In the following section I shall sketch, in the form of an ideal type, a profile of a standard case of the problem of misidentification that reflects some of the biases both in the expository literature and in official or orthodox definitions of the problem – I shall argue that a broader ‘information model’ of misidentification may provide the basis for a more systematic and more realistic approach to the topic. In the final section, the main elements of the problem of misidentification are re-examined in the light of the previous discussion and some implications of adopting a broader perspective in this context are suggested.

The analysis takes as its starting-point the Devlin Report and four very useful books on the psychological aspects of eyewitness testimony and identification by Clifford and Bull, Loftus, Yarmey, and Lloyd-Bostock and Clifford.² Those four works, together with the chapters in the present volume, adequately survey the literature and provide a convenient basis for taking stock and considering future directions: for the purpose of this chapter these works will be taken as representative of the literature on identification. It is part of the thesis of this chapter that *some* discussions of identification have been influenced by some of the biases in the expository approach – notably a tendency to concentrate on adjudicative decisions in contested criminal cases and to view information about identity largely, if not solely, in terms of admissible evidence presented to a jury. However, it is important to emphasize at the outset that by no means all writers on the subject have taken so narrow a view of the subject. In particular this chapter should not be read as a critique of recent contributions by psychologists to the study of eyewitness identification and related problems. The psychological literature has not been entirely free of some of the narrow assumptions that are criticized here; but the main thrust of the chapter is to warn against some tendencies in legal literature and to sketch the basis for a broader perspective on the subject.

Two perspectives on law and legal processes

At some risk of over-simplification it is convenient to postulate two contrasting approaches to the study of law which are current in the United Kingdom and, with some more or less significant variations, in the United States and other parts of

the English-speaking world. Each approach suggests a differing perspective on the problem of identification and hence on the potential contribution of psychologists and others. The first, which I shall refer to as the Expository Tradition, is sometimes known as 'legal formalism' or 'the black letter approach'. It has, at least until recently, dominated academic law in the United Kingdom during this century and it is exemplified by such standard works as *Cross on Evidence*, *Smith and Hogan on Criminal Law*, and *Salmond on Torts*.³ In this view, the study of law consists predominantly of the exposition, analysis and, to a lesser extent, criticism of the rules of positive law in force in a given jurisdiction. Its protagonists would readily concede that history, the social sciences, and other disciplines are relevant to an understanding of law, but they tend to treat them as marginal and not really part of the specialized study of law. Thus the subject matter of evidence is the *rules* of evidence; *Cross on Evidence* for example, scarcely makes any reference to the logical, mathematical, epistemological, scientific, psychological or other 'non-legal' aspects of evidence and proof. Cross sharply differentiates the law of evidence from the law of procedure and from substantive law. Much legal writing about evidence proceeds on the assumption that if there were no rules of evidence there would be nothing for lawyers to study. Similarly, within the Expository Tradition, even the study of procedure has been largely confined to the rules of procedure. Few legal scholars have adhered rigidly and consistently to this view, but its influence has nevertheless been both pervasive and profound. It has not merely influenced legal education and legal scholarship, but has also provided the main underlying basis for the ways of thought and discourse about law of most practising lawyers and judges, even in the context of debates about reform.

An alternative approach (only one of several alternatives) I shall refer to here as the Contextual Approach.⁴ The central unifying tenet of this approach is that rules are important – indeed a central feature of law – but for the purposes of understanding, criticizing or even expounding the law, the study of rules alone is not enough. Rather, legal rules, institutions, procedures, practices, and other legal phenomena need to be set in some broader context. What constitutes an appropriate context depends on the purposes of the study or other discourse in question. For example, if one is concerned to study the law of evidence in action, the rules of evidence need to be viewed in the context of the legal processes in which they in fact operate and those processes may need to be seen in the context of other social processes. In this view, the rules of evidence are only one small part of the subject of evidence and proof.⁵ The rounded study of evidence, as part of the study of law, would include logical, philosophical, psychological, processual, and other dimensions. In order to make such a study coherent and manageable an overarching theory of evidence (or evidence and proof) is needed which provides a unifying conceptual framework, and, at the very least, maps the connections between these various aspects or dimensions.⁶

It is not necessary to canvass the much-discussed merits and limitations of these two different approaches;⁷ but it is relevant to consider briefly certain tendencies or

biases in the Expository Tradition that are to be found in some of the legal literature that has a bearing – on the present subject. In its extreme form the Expository Tradition tends: (a) to be rule-centred; (b) to pay disproportionate attention to the decisions of appellate courts; (c) to treat jury trials as the paradigm of all trials; (d) to concentrate on events in the courtroom, to the exclusion of pre-trial and post-trial events; (e) to adopt a rationalistic and aspirational approach to problems of evidence rather than an empirical perspective; and (f) in discussing reform, to take existing rules and devices as the starting-point for response to problems, with a consequent tendency to be rather thin on diagnosis.

All of these tendencies are to be found to a greater or lesser extent in expository legal literature, as exemplified by orthodox treatments of the Law of Evidence; they are less marked in recent legal literature on judicial processes. I shall suggest that examples of some, but not all, of these tendencies have spilled over into recent discussions of identification.

Rule-centredness

We have seen that there is a tendency in the Anglo-American literature to treat the rules of evidence as constituting all, or nearly all, of the subject of evidence. It happens to be the case that the Anglo-American systems have by and large turned away from trying to regulate questions of *cogency* (or weight) and questions of *quantum* (amount) of evidence by means of rigid rules. (One of the few exceptions to this are the rules requiring corroboration in certain limited situations.) The great bulk of evidence doctrine is concerned with the rules of admissibility and exclusion – that is to say, rules governing what evidence may or may not be presented in what form and by whom to the decision maker.⁸ This represents a partial victory for Jeremy Bentham, who argued that there should be *no* formal rules of evidence.⁹ Since the middle of the nineteenth century there has been a general, if slow, trend in the direction of deregulating evidence along the lines advocated by Bentham. However, as is well known, his victory has not been complete, especially in the United States. What is significant in the present context is the fact that many aspects of presenting and weighing evidence are not governed by formal rules at all and that it is widely recognized that changes in the law of evidence represent only one of a number of possible strategies for tackling problems of misidentification. Thus, the Devlin Report conspicuously rejected the idea of a formal rule requiring corroboration of eyewitness identification testimony or of excluding such evidence; and it was generally sceptical as to whether much could be achieved by changing legal rules, except perhaps rules governing procedures of identification parades.

The literature on identification is not strikingly rule-centred in the sense of focusing on formal rules: more attention has been paid to techniques for improving reliability of identification and to warnings about the pitfalls and dangers of eyewitness identification, independently of the formal rules of evidence. Nevertheless, some writers have from time to time talked as if this is part of the *law* of evidence. For example, Professor John Kaplan in his introduction to Elizabeth Loftus's *Eyewitness*

Testimony treats the book as ‘a contribution to the *law* of evidence’ and implies it is strange that ‘there are virtually *no* rules which govern what witnesses may say they saw with their own eyes’.¹⁰ This is a harmless example of rule-centred talk. Ironically, Professor Kaplan himself has made a pioneering contribution to the discussion of probabilities and proof,¹¹ another topic concerned with evidence where significant steps have been taken away from the rule-dominated treatment of evidentiary issues in recent years. Elizabeth Loftus herself, in considering possible responses to the problem of unreliability of eyewitness testimony explicitly rejects formal rules of exclusion or of corroboration as remedies; she is dubious about the efficacy of cautionary instructions to the jury and she advocates, as the most important remedy, a more widespread use of psychologists as expert witnesses.¹² Suffice it to say here that problems of misidentification are only marginally concerned with the formal rules of evidence and that this has by and large been recognized in the literature.

‘Appellate court-itis’

The American jurist Jerome Frank identified one of the major diseases of legal formalism as ‘appellate court-itis’ – that is, a tendency to concentrate far too much attention on the work of appellate courts and disputed questions of law (as exemplified by the commanding position in legal literature occupied by law reports), with a corresponding almost total neglect of the work of trial courts and of disputed questions of fact.¹³ Not surprisingly, the literature on eyewitness identification is largely free of this bias; for example, the Devlin Committee cited barely a dozen appellate cases, while devoting nearly sixty pages to the detailed analysis of the total process involved in the cases of *Dougherty* and *Virag*, in striking contrast with most orthodox legal literature.¹⁴ Elizabeth Loftus quite legitimately devotes a section to Supreme Court decisions on eyewitness testimony but fully recognizes that legal doctrine developed by the court is only a small part of the whole story.¹⁵

Jury-centredness

The first step away from ‘appellate court-itis’ is to shift attention from appellate to trial courts. There is a tendency in the orthodox literature on evidence to treat the contested jury trial as the paradigm case of all trials. This is understandable, though misleading, if only because the history and rationale of the rules of evidence are intimately bound up with the institution of the jury. Moreover rules of evidence tend to be applied more strictly in jury trials than in other proceedings. Nevertheless, this concentration on the jury has been strongly challenged by some writers. The American scholar, Kenneth Culp Davis has suggested that nearly all literature and discourse about evidence is dominated by ‘jury thinking’ and that this is inappropriate since only a tiny minority of all trials are jury trials.¹⁶ The jury is less important in England than it is in the United States; an even smaller proportion of criminal cases, albeit many of the more serious ones, are tried by juries. The jury has almost completely atrophied in civil cases in this country and is on the decline in the United States.¹⁷

Apart from the obvious reason that juries tend to deal with more serious and more spectacular cases, another reason for the dominance of ‘jury thinking’ in much legal literature and public debate is that a high proportion of the contributors are judges and senior barristers, whose experience – at least their recent experience – has tended to be confined to jury trials. In the past academic lawyers have also tended to be prone to the biases of ‘jury thinking’, but recently increased academic attention has been paid to magistrates’ courts and to tribunals.

Much of the literature on identification has been jury-centred. Psychologists writing on the subject such as Loftus, Yarmey, and Clifford and Bull, although they occasionally use examples from non-jury trials and other proceedings, sometimes seem to *assume* that eyewitness testimony of identification is presented to a jury. Even more striking is the fact that the Devlin Committee devoted only three pages out of nearly two hundred to magistrates’ courts and explicitly decided to limit their recommendations (‘for the time being’ [*sic*]) to trials on indictment. The main reason given for this was that disputes as to identity and disputes involving alibi evidence are rare in summary proceedings, but no evidence was advanced for these statements.¹⁸ Thus it is fair to say that the bulk of literature about identification is strikingly jury-centred; whether this is justifiable will be considered below.

Court-centredness

The shifts from appellate courts to jury trials and from jury trials to all trials represent important steps in broadening the focus of attention of legal studies in the direction of a more balanced and realistic treatment of legal processes generally. An even more important advance has been to face the fact that what takes place in open court represents only one small part of legal processes and to follow through the implications of this perception. We all know that only a small minority of cases ever reach the stage of being contested in court and that the outcomes of contested cases are heavily influenced by events and decisions that have occurred before trial. Yet to an extraordinary extent orthodox legal literature and discourse have disguised these facts and their implications. This can be illustrated by contrasting standard works on evidence and on procedure. To put the matter in simplified form: the bulk of Anglo–American literature on *evidence* still tends to assume that the contested jury trial is the paradigm and to concentrate on events in the courtroom; on the other hand, nearly all modern Anglo–American literature on *procedure* considers total legal processes, starting with some initial situation or triggering event and following through a variety of stages of different kinds of process, often beyond formal adjudicative determinations of guilt or liability (or other determinations) to post-adjudicative decisions and events, such as sentencing, parole, and the enforcement of civil judgments.

During the past decade broader approaches have gained much wider acceptance in the United Kingdom, with the result that the dominance of the Expository Tradition has been quite successfully challenged, although first-class expository work is still, quite rightly, accepted as a respectable form of legal scholarship. This

movement is quite neatly illustrated by the differences between three reports which have dealt, *inter alia*, with criminal evidence and procedure in recent years. The Eleventh Report of the Criminal Law Revision Committee (1972), which concentrated almost entirely on contested trials on indictment and on the operation of rules of evidence in court, is a fairly typical product of the Expository Tradition. In sharp contrast, the later Report of the Royal Commission on Criminal Procedure (Philips Report, 1981) devoted more attention to police powers and pre-trial events and decisions than to proceedings at trial and was almost as much concerned with summary proceedings as with trials on indictment. The Philips Report in many respects is based on a contextual approach. Viewed thus, the Devlin Report can be treated as an example of a half-way house, combining features of both approaches; its analysis of the cases of *Dougherty* and *Virag* represents excellent case-studies based on a total process model and, in some respects, it took into account a variety of considerations; yet the Report is not entirely free of the biases and hidden assumptions of the Expository Tradition, as is illustrated by its concentration on contested jury trials and its failure to explore the scale and distribution of cases of misidentification.¹⁹

In so far as the debate on misidentification has concentrated on eyewitness *testimony*, and has treated identification parades solely as evidence-generating devices, it has tended to be court-centred. However, a shift towards a broader perspective is discernible in some recent writings.

Optimistic and complacent rationalism

Anglo-American evidence scholarship since the time of Jeremy Bentham has been remarkably homogeneous, not least in respect of its acceptance of the idea that modern methods of adjudication are 'rational'.²⁰ The dominant approach has been expository, as exemplified by the works of writers such as Starkie, Greenleaf, Taylor, Stephen, Phipson, McCormick, and Cross. But Bentham's writings on evidence, Thayer's *A Preliminary Treatise on Evidence of Common Law* (1898), Michael and Adler's *The Nature of Judicial Proof* (1931), and Eggleston's *Evidence, Proof and Probability* (1978) are leading examples of an alternative tradition in which attempts have been made to go beyond exposition of the rules to deal with historical, logical, psychological, and other dimensions of evidence and proof. The greatest evidence scholar, the American, John Henry Wigmore, straddled both perspectives; his ten-volume *Treatise on Evidence* is generally regarded as one of the major achievements of expository scholarship; on the other hand, the historical aspects of the *Treatise* and his *Principles of Judicial Proof as Given by Logic, Psychology and General Experience* (later *The Science of Judicial Proof*) remain the single most important attempt since Bentham to establish a Science of Proof, based on a coherent general theory which covers both the rules of evidence and the non-legal aspects of probative processes.

Some of the best legal minds have contributed to this dual tradition of evidence scholarship. What is particularly striking about it is the remarkable homogeneity

of the basic underlying assumptions of what may be termed the Rationalist Tradition of evidence scholarship. Almost without exception the leading Anglo-American scholars have, either explicitly or implicitly, adopted a view of adjudication which treats it as a rational process directed towards rectitude of decision, that is the correct application of valid substantive laws through accurate determination of the truth about past facts in issue (i.e. facts material to precisely specified allegations expressed in categories defined in advance by law).²¹ This applies both to expository writers such as Phipson and Cross and those who were also interested in broader perspectives on evidence and proof, such as Wigmore.

The claim that the modern system of adjudication is 'rational' is best treated as a statement of what is considered to be an *aspiration* of the modern system; the aim is to maximize the rationality and accuracy of fact-finding in adjudication, so far as this is feasible and is compatible with other, overriding social values. Such aspirational rationalism does not necessarily involve a commitment to the view that the aspiration is always or even generally realized in practice. It is commonplace within the classical Rationalist Tradition to criticize the existing practices, procedures, rules, and institutions in terms of their failure to satisfy the standards of this aspirational model. Nor within this general framework of assumptions is there a general consensus on all particular issues; the intellectual history of Anglo-American scholarship and discourse has had its share of long-running debates,²² but there has been an extraordinarily high degree of consensus within the tradition about the objective of maximizing rationality and accuracy in determination of questions of fact and about the underlying assumptions as to what this involves. To be an aspirational rationalist of this kind can reasonably be construed as involving a degree of optimism about the feasibility of the aspiration; in evaluating and considering possible improvements in existing legal rules, institutions, and practices it does not make sense to postulate completely unattainable goals. Optimism easily spills over into complacency and, with some notable exceptions (including Bentham himself), nearly all leading Anglo-American Evidence scholars have not only been optimistic about the feasibility of their ideals, they have also tended to be complacent about the basic design of the system and its actual workings and effects in practice. It is as if they had said: 'It is a poor show that a dozen or so chaps a year get gaoled or executed on the basis of unreliable identification evidence; we need to take steps to reduce the number of mistakes, but, after all, it is only a dozen or so ...'

It is important to notice that the Rationalist Tradition is not only rationalistic and optimistic, with a tendency to complacency. It is also aspirational and unempirical. The focus of attention in discussions of the logic of proof, and in debates about probabilities as part of those discussions, is on how people *ought* to reason in arguing, deciding, and justifying their decisions; it is not on how they in fact do argue, decide, and justify. The study of logic is the study of what constitutes valid

arguments; it is not the study of actual mental processes. One of the main reasons, I suspect, for the perennial uneasiness of relations between law and psychology is that, quite understandably, legal discourse is predominantly normative, while the dominant intellectual tradition of psychology is empirical. Lawyers, both academic and practising, are not primarily concerned with systematic description, explanation or understanding of events in the real world. Even in debates about the reform of particular rules a standard pattern is to move directly from the existing rule to a recommendation for ‘improvement’, with at best only highly impressionistic and superficial notions of its operation in practice. The dominant intellectual tradition in psychology being scientific – that is primarily concerned with systematic description, explanation and understanding and with the establishment and testing of empirical generalizations – it is conversely strong on the empirical and less concerned with the normative aspect.

The Rationalist Tradition of evidence scholarship is also unsceptical. Within legal discourse there is, however, a contrasting, but somewhat diverse strain of apparent scepticism. Rabelais’s Bridlegoose threw dice to decide cases; Jerome Frank’s ‘fact-scepticism’ emphasized some of the obstacles to predictability in judicial decision making; many lawyers view the adversary process more as a controlled form of battle in which the main objective of the contestants is to win, rather than as a form of procedure designed to maximize the pursuit of truth through dialectical debate or disputation; contrasts between ‘the law in books’ and ‘the law in action’, between ‘theory’ and ‘practice’, and terms like ‘the forensic lottery’ are clichés in legal discourse. Before Karl Marx, Jeremy Bentham launched a full-scale attack on the mystifying devices of English law and procedure. Modern radical critics have carried on the tradition, arguing that many of the most cherished safeguards are merely a form of ideological facade and that ‘adversary’ proceedings are for a large part a myth. This alternative strand in legal thought is more in tune with the warnings by psychologists about the potential unreliability of various kinds of testimony than is optimistic rationalism. Yet, as I have argued in chapter 4, many critical or seemingly sceptical writers tend to invoke the standards of prescriptive rationalism when criticizing existing practices or pointing to contrasts between aspiration and reality.

The way of the baffled medic: prescribe now, diagnose later – if at all²³

In the Expository Tradition, the existing rules of positive law are the natural starting-point for almost all legal discourse. There is a core of sense in the notion that one needs to know what the law is before starting to evaluate or to criticize it. But it is very easy to slide from this kind of attitude into a view of rules as things-in-themselves; once posited the law is the law independently of its origins or purposes. An alternative view of rules is to see them as responses to problems, or as instruments designed to further certain purposes or policies. In this view it is almost always sensible to see particular rules or bodies of rules in the context of

perceived problems to which they were a response or of the purposes which led to their creation. In evaluating or criticizing rules it is a good rule of thumb to identify and diagnose the problem before moving on to consider the adequacy or otherwise of the rule as a response to it. To study rules without reference to problems is like studying remedies without reference to diseases. Orthodox discussions of law reform follow the Way of the Baffled Medic in so far as they substitute one prescription for another without any serious attempt to diagnose the problem.

The literature on reform of the law of evidence is replete with examples of this tendency. The standard weakness is to assume that the nature of the problem is self-evident and that the scale of its central factors is either well known or irrelevant. Thus the CLRC (Criminal Law Revision Committee) managed to treat professional criminals manipulating technical rules of evidence as typical of the behaviour of all persons accused of crimes. Nowhere in the literature on identification is there a full analysis of the nature, scale, and epidemiology of 'the problem of identification'. Typically the problem is *assumed* to be something to do with the unreliability of eyewitness testimony in jury trials; sometimes, as in the case of the Devlin Report, the nature of the problem is asserted with little by way of evidence or analysis. I shall endeavour to show below that the nature, scope, and scale of the problem of misidentification is by no means self-evident.

Many early discussions of identification parades provided, in a less obvious way, further examples of the operation of the fallacy of the Way of the Baffled Medic. So much attention has been focused, at least until recently, on this particular device that it has sometimes appeared as if the problem of identification is perceived as being co-extensive with some acknowledged defects and limitations of parade or line-up procedures and that the only, or at least the central, question is: How can the reliability of identification parades be improved? This is an interesting and legitimate question, but on its own it suffers from at least two limitations; it focuses on only one possible response to the problem of identification, assuming that one knows what the problem is; and it suggests that the only use of such procedures is to produce *evidence* of identification – whereas a study of decisions when and whether to hold parades might show that in some police areas there may be other objectives or uses; for example, the elimination of suspects or a decision to drop a case for want of evidence, or to persuade a suspect that the game is up. Where the identification parade is the starting-point of discussion there has perhaps been a tendency to take too much for granted both about the problem of identification and about the uses and latent functions of the device, to focus rather narrowly on a limited range of cases and to consider other possible devices, such as the use of photographs, too much in contrast with parades rather than to consider their potential in a variety of contexts. Starting from existing solutions, concentrating on only one of a possible range of devices, and not asking demographic questions about the phenomena under consideration are standard biases associated with the Expository Tradition.

Two models of misidentification

The contrast between the expository and contextual approaches to law may be reflected, at least in part, by contrasting views of what constitutes a standard case of misidentification. The analogy is not exact because, as we have seen, the orthodox definition of the problem does not simply reflect the tendencies and biases of an expository approach in its purest form. Nevertheless, it is possible to postulate a standard case, which is a fair reflection of the narrow view of the problem that was stated at the start of this paper. It may be helpful to depict this as an ideal type, consisting of a number of elements and to note some possible variants in respect of each element, as in table 3.

Three points about table 3 deserve comment. First, the standard case shares some, but not all, of the tendencies associated with the Expository Tradition (especially as illustrated by orthodox writings on evidence). In particular, it concerns an *incident* leading to a *contested case* tried before a *jury* in which the main role of the witness (W) is to provide *admissible evidence* of identification. The emphasis is on the objective reliability of evidence presented in *court*, and on *conviction* of innocent persons as the sole mischief of misidentification.

Secondly, in so far as psychologists and other writers on identification have tended to concentrate on examples which share all or most of the features of the standard case, they have also – perhaps unwittingly – shared some of the biases of the Expository Tradition. However, some researchers and commentators have pursued one or more variants of the standard case. For example, a good deal of attention has been paid to possible differentiating characteristics of witnesses, such as age, sex, and race: rather less attention has been paid to differentiating characteristics of subjects, except in regard to race.²⁴ Similarly as Baddeley and Woodhead have pointed out,²⁵ identification of persons may have special practical significance for certain occupations such as immigration officers, bank clerks, prostitutes, and the police. This raises questions both about the possibilities of improving the performance of such persons in providing reliable information and whether training or experience significantly improves capacity to identify. However, the crucial point here is that investigation of such variants has proceeded neither on a systematic basis nor in the context of some general theoretical framework. At best, it has tended to be *ad hoc* and uneven.

Thirdly, the variants on the standard case point in a variety of possibly divergent directions. This raises the question whether what is needed is not a single polar ideal type, contrasting with the standard case, so much as a flexible model which can accommodate a variety of types of processes, of types of decisions within each process, and of types of cases, including both the standard case and at least the more important variants of the kind indicated above. This involves a shift of perspective to a higher level of generality than is postulated by the standard case. What I wish to suggest is that the basis for such a perspective is to hand in a way that combines elements of contextual perspectives on legal process and some notions about

Table 3. *Ideal type or standard case of misidentification and possible variants*

Standard case	Some possible variants
A <i>witness</i> (W) of indeterminate age, sex, class, race, and occupation	W was middle-aged, male, myopic, middle-class, white, bank clerk or immigration officer;
<i>sees</i>	contact was by telephone or involved a combination of visual, aural, and other impressions;
an <i>incident</i>	W alleges that O was present in a particular vicinity, e.g. a theatre, a bar, a bed;
of <i>short duration</i>	over a period of hours or longer;
which becomes the subject of <i>criminal</i> proceedings	the issue of identification arose in a civil proceeding or a tribunal hearing or other proceeding, such as a university disciplinary hearing;
in a <i>contested</i> case	the case was not contested, for example O pleaded guilty or the case was settled out of court or proceedings were dropped;
tried before a <i>jury</i>	the (contested) hearing took place before a bench of magistrates or a professional judge or a court martial or other tribunal;
in which W <i>willingly</i> gives <i>evidence</i>	W was coerced or bribed or compelled to testify; the information given by W was used for purposes other than forensic evidence, e.g. as information leading to suspicion or investigation, or to neglect or elimination of a line of enquiry;
of the <i>identity</i>	it was sufficient for the purposes of the enquiry that O was placed within a certain class of people rather than was identified as a unique individual;
of the <i>accused</i> (O)	the object of identification was a <i>thing</i> (e.g. a car, a typewriter or a gun) or an <i>animal</i> ;
a person of <i>indeterminate</i> age, sex, class, race, and occupation	O was a black, male youth or a one-legged elderly woman;
who was a <i>stranger</i> (i.e. previously unknown to W)	the subject was well known to W;
W's evidence is unsupported by other evidence of identification	W's evidence was corroborated or denied by other testimonial or circumstantial evidence;
and is <i>unreliable</i>	several factors in the particular situation enhanced the probability that the identification was reliable – e.g. W was an experienced or trained observer, the period of observation was substantial, O was already known to W, and so on;
but <i>results</i>	the information or evidence of W was not believed by the jury or other relevant participant(s);
in the <i>conviction</i> of O.	the <i>mischief</i> of the alleged misidentification was not that the subject was wrongly convicted or acquitted, but that he or she suffered <i>vexation</i> and/or <i>expense</i> and/or <i>delay</i> (with consequential injury) through being suspected or arrested or interrogated or charged or sued, or suffered some <i>other</i> serious damage, such as injury to reputation or loss of a job.

information-processing borrowed from cognitive psychology and information theory: the result might be a composite ‘information model’, which is broader than, but incorporates, the traditional evidentiary model that is assumed in the standard case.

Let me revert briefly to the contrast between expository and contextual perspectives on law. Although the intellectual history of Anglo–American legal scholarship has not followed a single neat line of development, it is possible to pull out one thread which forms something of a pattern: this is a steady broadening of the focus of attention beyond disputed questions of law, represented by the standpoint of appellate court judges, through steadily wider conceptions of different legal processes to a view of law in the context of society as a whole and, indeed, of humankind and of the universe. To put the matter simply: the focus shifted from disputed questions of law in appellate courts to disputed questions of fact tried before juries, to contested cases tried before courts without juries (and before other tribunals and arbitrators) to other methods of dispute-settlement. This broadening of the focus of attention to include other *arenas* was paralleled by a perception that even the most formal kind of legal process involved a sequence or *flow of decisions and events* involving a variety of *participants*. Such total processes, like stories, have no finite beginnings and endings other than those points selected, often arbitrarily, as suitable for the particular purpose at hand by the particular expositor, story-teller or whatever. In its most comprehensive and systematic version, as presented by Lasswell and McDougal,²⁶ the physical universe is the universe of discourse and any particular legally significant decision or event needs to be considered in the context of some larger legal process which in turn belongs to a broader totality of social processes.

Such contextual models of legal processes are, of course, quite commonplace today, even within legal scholarship. They are explicitly used, or assumed by implication, in most contemporary writing about identification. But the potential of such models has not been consistently and fully exploited in treatments of identification. A particularly revealing example is to be found in a recent book by a psychologist. In his chapter on ‘Evidence and Truth in the Criminal Justice System’, addressed to non-legal readers, Yarmey – presents a model of ‘Major Events and Proceedings Involved in a Criminal Prosecution’ (figure 1).²⁷

This flow-chart was designed to provide a general introduction to criminal process as one context in which eyewitness evidence is important. It is interesting in that some of the categories it uses – ‘facts gathered’, ‘theories constructed’, ‘data analysed’, ‘evidence presented’, ‘facts’, ‘truths’ – could equally well be fitted into an information-processing model of a kind that is to be found in books on cognitive psychology²⁸ or on information theory.²⁹ This suggests that it might be relatively easy to integrate a more sophisticated model of typical criminal processes (and models of other legal processes) with one or more standard models of information-processing, borrowed from other contexts.

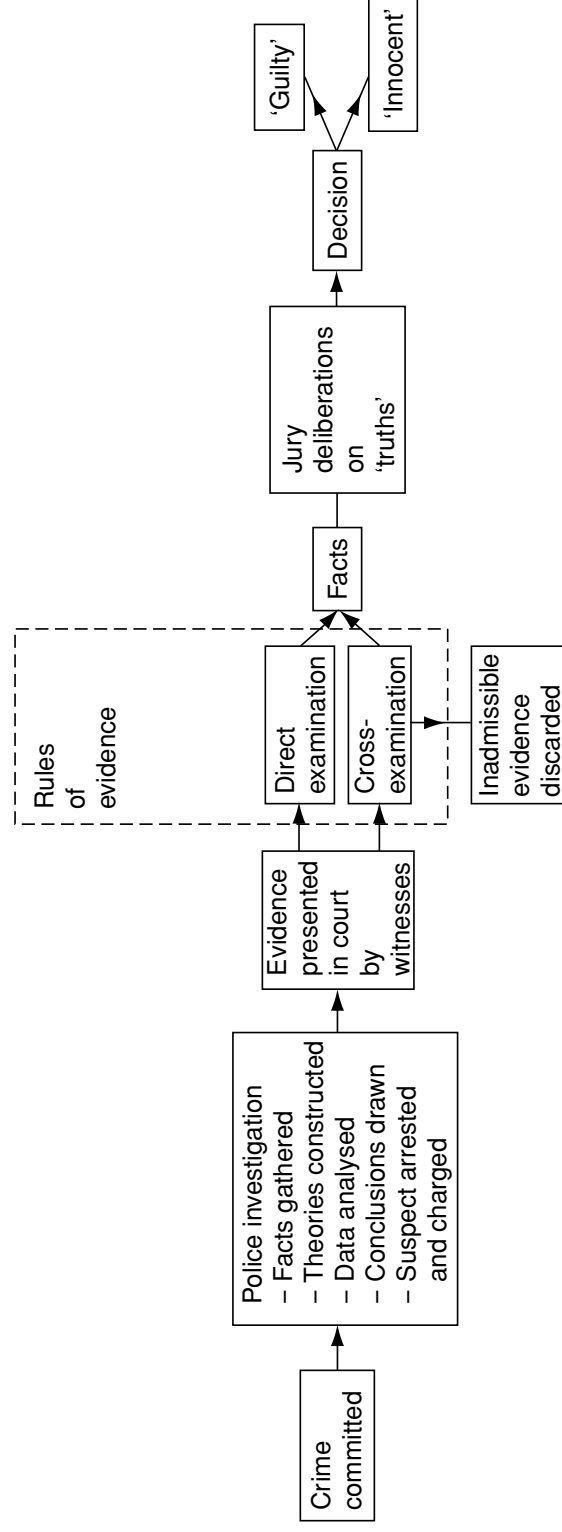


Figure 1 Major events and proceedings involved in a criminal prosecution (from Yarmey, *The Psychology of Eyewitness Testimony*, 1979: reproduced with permission)

For the purpose of a detailed analysis of problems of identification and misidentification, Yarmey's flow-chart would need to be expanded and refined in a number of ways. First, it is important to bring out the fact that by the time a witness comes to testify at the trial he or she has typically 'presented' at least some of his or her information on several previous occasions, for example in informal conversation, in interviews with the police and possibly with one or more lawyers, in depositions, perhaps at committal proceedings and so on. This is one reason why it is useful to think in terms not merely of witnesses testifying (*evidence*) but of the creating and processing of *information*. An adequate model for the purposes of the study of identification should indicate at least standard points in the process at which eyewitnesses report what they think they saw, what stimulated them to report, to whom, in what context and for what purposes.

It is also important to remember that information provided by eyewitnesses is relevant to a number of other decisions in criminal process – for example, the decision to hold an identification parade, the decision to prosecute, the decision to charge, the decision to plead guilty or not guilty, the decision whether or not to call a particular witness and so on. Such decisions should not be seen merely as stages on the way to a jury verdict: they can have other direct consequences, some of which can surely be called 'consequences of identification'. Again, an adequate model would include all the standard decisions and events which might have such consequences.

Yarmey's model follows convention in depicting standard processes as following a single linear pattern. A crime is committed – the police investigate – a suspect is identified, located, arrested, and charged – a case is prepared – and the evidence is presented in court. As readers of detective fiction will know, criminal processes do not follow a single pattern: in particular, the stages of an investigation follow in no set sequence and may overlap to a greater or lesser extent with preparation of the case against (or on behalf of) a particular suspect. Sometimes the story could be said to begin with a policeman seeing someone behaving suspiciously: if the starting-point is the finding of a dead body, it may or may not be clear at the outset that death was due to a criminal act and this can readily affect the sequence of investigation. Similarly police enquiries, formal 'interviews', identification parades and so on do not follow a single sequence – there are at least several different patterns. The immediate significance of this is that eyewitnesses play a variety of roles at different stages of pre-trial processes and this may have very significant impacts, both on their own mental processes and on how information provided by them is treated or used.

The above analysis suggests that an 'information model' as a basis for a systematic approach to the subject of identification and misidentification in legal processes would need to satisfy the following conditions: it would need to accommodate all the main types of legal processes, rather than merely criminal processes; it would need to cover the main stages in each type of process, rather than concentrate on events in the courtroom; and it should be able to identify different points at which

information relating to identification is provided, by whom and to whom, and how that information is processed and is used in a variety of types of decisions by different participants at different stages in the process. Furthermore it would need to point to the consequences of such decisions – especially the actual and potential mischiefs for the objects of identification. Finally, in deciding on the practical importance of particular research strategies, reforms, etc., some estimate would need to be made of the typicality and scale of the more important phenomena involved.

To produce such a comprehensive model would be an ambitious enterprise, which is beyond the scope of this chapter. However, it may help to concretize the discussion and suggest some possible ways forward by taking a fresh look at the problems of identification in the light of such considerations.

Redefining the problem of (mis)identification

It is a truism that the characterization, definition, and diagnosis of a practical problem depend on the standpoint, perceptions, concerns, and objectives of those doing the defining. ‘The problem of identification’ as it emerges from the literature has certain obvious characteristics. It is seen as a practical rather than a scientific or intellectual problem: the underlying concern is to improve legal processes rather than solely or even mainly to understand them better. It is seen mainly as a problem of design; and the standpoint is ‘official’ – not in any pejorative sense of that term – but, like Bentham’s legislator, the standpoint is primarily of those responsible for the design and healthy operation of the system.

Eyewitness identification can, of course, be studied from a variety of other standpoints. It can, for example, be looked at from the point of view of the victim – as was done in part by Peter Hain.³⁰ It could be looked at from the point of view of police investigators or detectives or of prosecution or defence lawyers preparing cases, or of witnesses or of judges or jurors or of other participants in legal processes. It is also quite possible that the study of eyewitness testimony may produce insights, hypotheses, and findings which might be of theoretical significance in general psychology or in our understanding of legal processes.

To date, however, the primary focus has been on the practical problem of reducing the incidence of misidentification in the administration of justice; this is also the focus of this chapter. From that point of view, I wish to suggest that the problem has been defined in an artificially narrow way and that, while some of the limitations are justifiable on grounds of keeping the subject manageable, others are not. Accordingly let us look at some of the main ingredients of the ‘problem’ in turn.

The notion of identity

Wigmore, in what remains one of the best theoretical discussions of evidence of identity, stated:

Identity may be thought of as a quality of a person or thing – the quality of sameness with another person or thing. The essential idea is that two persons or things are for the moment conceived as existing, but that one is alleged, because of common features, to be the same as the other; so that there is in fact only a single person or thing . . . The process of constructing an inference of identification . . . consists usually in *adding together a number of circumstances*, each of which by itself might be a feature of many objects, but *all of which together can most probably, in experience, co-exist in a single object only*. Each additional circumstance reduces the chances of there being more than one object so associated.³¹

In the present context it is not necessary to start, let alone to chase, any philosophical hares about the notion of ‘sameness’. At least in respect of identification of persons such puzzlements rarely, if ever, raise any issues of practical consequence. However, it is worth noting that in some legal contexts the problem of what constitutes identity (of, for example, ideas, transactions, or things) is both familiar and important, as students of copyright, passing off, and Roman Law will know. So long as the problem of identification is confined to persons, the notion of identity may be taken for granted; if the subject is extended to things, then the matter may not always be so straightforward. Alger Hiss’s typewriter either was or was not the one on which the documents were typed; but that may not be true of a stolen car that has been dismantled or a metal object, such as a piece of silver plate, that has been melted down.

‘Identifying’

If one looks at the ‘problem of identification’ in the context of legal process as a flow of decisions and events, it is obvious that a complex variety of mental processes and human actions are involved: seeing, hearing; acquiring, storing, interpreting, and retrieving information; recognizing; believing; asserting, communicating, describing, persuading; deciding; and so on. It is also obvious that the mental processes and actions of a variety of individual participants are involved and that they interact in complex ways. In the light of this it is worth noting two points about the concept of ‘identification’. First, in the context of phrases like ‘the problem of identification’ it covers a complex range of mental processes and actions that need to be differentiated. Secondly, in some contexts statements of the kind ‘X identified Y’ may be ambiguous: such a statement could mean ‘X *recognized* Y’ or ‘X formed the *belief* that Y was the same as Z’ or ‘X *decided* that Y was probably the same as Z’ or ‘X *asserted* that Y was the same as Z’.

It would not be appropriate here to attempt a systematic analysis of the main concepts and distinctions involved. But it is worth making the point that a systematic theory of identification in legal processes requires a quite elaborate conceptual framework which would need to draw on the language of both law and psychology. It would, for example, be necessary to integrate concepts and terminology from cognitive psychology (such as acquisition, retention, and retrieval of

information) and from information theory (such as ‘noise’, ‘signal’, ‘coding’, and ‘active’/‘passive’ information). Some standard concepts from decision theory and social psychology may also be useful, in addition to concepts and distinctions from legal discourse such as materiality, relevance, admissibility, and receivability; quantum, cogency, and corroboration of evidence; *factum probans* and *factum probandum*; and the whole panoply of standard procedural concepts. This is not intended as a plea for the jargonization of identification; rather it is to emphasize the truism that in this as in other spheres of inter-disciplinary work an important step towards an integrated approach is the harmonization of concepts from the relevant disciplines.

A further point about psychological aspects of the subject is suggested by the foregoing: several different branches of psychology are relevant to the study of identification. In recent years the psychology of eyewitness identification has spread beyond concentration on the cognitive processes of one actor, the witness, to include other established lines of psychological enquiry. Saks and Hastie (1978), for example, have been praised for directing attention to other actors, but have been criticized for concentrating too much on individual actors while neglecting ‘the intricate web of relationships that bind and define different actors’ (Loh, 1981). Clifford and Bull have pointed to several areas of social psychology that are directly relevant to the relatively narrow topic of person identification in contested jury trials. Broaden the perspective and other arenas may become relevant as well. This suggests that there is already in existence a substantial accumulation of concepts, theories, and findings in psychology, and elsewhere, some of which have not yet been perceived to be relevant to the subject of identification, at least in any sustained and systematic manner.

Identity of what?

The ‘ideal’ case and nearly all of the literature on eyewitness identification concentrates on what Clifford and Bull³² referred to as ‘person identification’, and this is an advance upon the general assumption that all objects of identification are male. However, Loftus reports on some experiments in which identification and recognition of cars were involved and other examples are to be found in the literature.³³ Cases of eyewitness identification of objects or of animals can arise in practice and some of the psychological processes involved may be similar, if not identical. For many purposes it may be perfectly justifiable to focus primarily or exclusively on identification of persons – as I shall do from now on – but it is worth bearing in mind that many of the same considerations apply to identification of things; furthermore people are often identified or recognized through their close association with distinctive things, such as clothes.

Identification by what means?

Identity may be proved in court by circumstantial or testimonial evidence or by a combination of the two. As forensic science has developed, technological

improvements such as fingerprinting, blood grouping, microanalysis of traces and the like have increased in practical importance; eyewitness identification may over time become correspondingly less important, nevertheless it is likely to continue to have a role to play in investigation and in litigation, both civil and criminal, for the foreseeable future.

So far as analysing the problem is concerned only a few brief comments about means are needed. One point worth noting is that recognition is not solely visual; it is in theory possible to recognize another person by any one of the five senses; as a practical matter, as has often been acknowledged, identification may involve a *combination* of two or more senses, most commonly sight and hearing.³⁴ Accordingly, it may be artificially narrow or misleading to define the problem strictly in terms of *eyewitnesses*.

Another form of combination needs also to be borne in mind. The paradigm case postulates that identification is based on the testimonial evidence of one or two eyewitnesses alone. However, the question of reliability of this kind of testimony remains in cases where there is a combination of testimonial and circumstantial evidence, especially where the circumstantial evidence alone is not sufficient to settle the issue. Thus even a rule requiring corroboration of eyewitness evidence of identity in certain kinds of case would not eliminate the need for guidance as to the likely reliability of a particular item of testimonial evidence in a given case. It is also worth noting that the problem of combining convergent evidence of different types has also puzzled logicians and other theorists of evidence.³⁵

Finally it is worth remarking that much more attention has been given to date to evaluating the reliability of existing methods of eyewitness identification, such as confrontations, dock identifications, identification parades and the like, than to inventing new devices or radically improving existing ones. In particular, discussions of the use of photographs seem on the whole to be rather unimaginative about the possibilities, perhaps because they dwell on the limitations of the photograph and the dangers of existing uses to which they are put rather than concentrating on how their advantages – especially cheapness, convenience, and flexibility – can be exploited and how procedures can be devised which offset or mitigate some of the acknowledged dangers and limitations.

The mischiefs of misidentification: who are the victims?

The paradigm case in nearly all of the literature on identification assumes that the only mischief arising from misidentification is the conviction of the innocent. Even if one extends this to other mistaken adjudicative decisions (such as the wrong person being held liable or even erroneous acquittals) this is an extraordinarily narrow conception of the mischiefs involved. Suppose, for the sake of argument, that Roger Orton was indeed the real Roger Tichborne, what were the consequences of the mistake? He was not only convicted of perjury and imprisoned: he lost

his inheritance, his reputation and a good deal else besides; he was subjected to considerable expense and mental agony; and, in a sense, he even lost his identity.³⁶ Peter Hain was acquitted of a charge of armed robbery, but can one seriously claim that he was not a victim of misidentification, given the anxiety, the expense, and the potential damage to his reputation that he suffered, in addition to what he refers to as ‘the indignity and injustice of being hauled through the courts’?³⁷ Hain wrote a vivid account of his experience; he also described a number of cases in which misidentification led to evils short of conviction, thereby reminding us that even to be suspected, interrogated, arrested or threatened with prosecution can be an unpleasant, even traumatic, experience with a whole range of possible harmful consequences, financial, psychological, and otherwise. To treat mistaken adjudicative decisions as the only evils of misidentification is symptomatic of a narrow kind of formalism. Conviction and punishment of the innocent are among the great social evils; but they are not by any means the only ones. Add to Bentham’s notions of the collateral pains of procedure – vexation, expense and delay – the notion of other harmful consequences, direct and indirect, of being involved as a party in legal processes and one has a more comprehensive conceptual basis for assessing the mischiefs of misidentification.

To broaden the enquiry in this way has important implications: it forces us to look at the consequences for the object of identification (and for others) at every step in legal process; it also transforms our estimates of the likely scale of the problem, for under ‘victims’ of misidentification are now included all those who have fallen under suspicion, who have been interrogated, harassed, arrested, charged, paraded, or have been involved in other unpleasant experiences in civil, criminal or other proceedings or in expense as a result of information derived from a witness. While the number of people wrongly convicted by a jury as a result of eyewitness identification may be as few as ten or a dozen over a year, the number who have suffered other evils of misidentification may number hundreds or even thousands. By broadening the notion of victims our perception of the nature and scale of the problem is transformed.

Two objections to this move need to be considered. The first is that it is reasonable to concentrate on mistaken *adjudicative* decisions, because these represent at once the most serious consequences of misidentification and the most easily remedied. No amount of improvement of the system can prevent innocent people falling under suspicion or being the subject of false allegations. A second possible objection is that to broaden the definition of the problem in this way renders it unmanageable.

To which one may reply: First, which is the greater social evil: an estimated ten or a dozen convictions of innocent persons each year or hundreds, perhaps thousands, mistakenly subjected to the vexations, expense, and other consequences of being involuntarily involved in legal processes. Even if one concedes that wrongful conviction of the innocent is necessarily always the worst evil – which is debatable –

surely the potential scale of the wider problem is such as to demand at least as much attention.

Secondly, from several points of view it is artificial to isolate one harmful consequence of being involved unwillingly in legal processes from the other consequences. What the consequences that flow from a single, wrongful or mistaken identification are in a particular case is largely a matter of chance. For the individual victim the evil consequences tend to cumulate, whether or not the formal outcome is an unfavourable adjudicative decision. To borrow a phrase from Malcolm Feeley, very often ‘the process is the punishment’.³⁸ From the point of view of improving the system, almost any measure affecting the adjudicative stage will also affect other stages in the process: for example, there is a widely held view that one of the most important ways of avoiding wrongful convictions is to exercise more careful control over decisions whether or not to prosecute – but clearly measures affecting how such decisions are made have many potential ramifications in addition to the likely effect on wrongful convictions. The costs and benefits of almost any measure designed to deal with problems of identification cannot be rationally assessed by looking only at adjudicative outcomes.

Thirdly, to broaden the definition of ‘the problem of identification’ may lead to a more realistic appraisal of the complexities of the situation, but this does not make it any less manageable than other important topics in legal process, such as confessions, plea-bargaining, and settlement out of court. Of course, there is need for specialized lines of research – for example into police identification of juveniles in some particular kinds of situation – but any particular research project and the evaluation of the significance of its findings need to be set in the context of some broader total picture.

Identification for what purposes?

In the orthodox view it is common to treat the information provided by eyewitnesses solely as *evidence* to be presented at trial. If, however, one looks at criminal process as a whole one is likely to find that such information is used in a variety of ways: eyewitness accounts and descriptions may provide the first leads for identifying a suspect or, anterior to that, for searching for potential suspects who correspond to a description; at a later stage information provided by the witness may lead to the elimination of particular suspects during the course of investigation and, as was dramatically illustrated by the Yorkshire Ripper investigation, false or misleading information may lead to the premature elimination of a suspect. As we have already seen, identification parades need not be solely evidence-generating devices; they may also be used to eliminate suspects or they may lead to the discontinuance of a case for lack of potential evidence. Even if evidence of positive identification at a parade were not generally admissible, or were inadmissible in a particular case because of some defect in the procedure, occasional parades might still be useful as part of the process of detection. Information provided by eyewitnesses also

represents *potential evidence* which may have an important bearing on a number of pre-trial decisions, such as decisions to hold a parade, decisions to prosecute, decisions whether or not to plead guilty, and decisions whether to elect for summary trial or trial by jury. Thus, in considering problems of identification in the context of criminal processes as a whole, it is important to distinguish between the uses of information from eyewitnesses as *investigative information*, as *potential evidence*, and as *evidence actually presented* in court. There are no doubt other uses of such information in criminal processes, and analogous distinctions also need to be drawn in the context of non-criminal processes. It is useful to see evidence and potential evidence as species of information provided by eyewitnesses, for that should serve as a reminder that the phenomenon under consideration is a particular form of human information-processing in a rather complex kind of social process.

If one draws together the main strands in the foregoing analysis the following picture emerges: the starting-point of the process is a triggering event or situation in which one person, the witness, sees or hears another person, thing or animal, which on some subsequent occasion or occasions he or she is asked to describe or to state is the same as an object presented to his or her senses either directly, as in a parade, or through some representation such as a film, a photograph, a recording, a drawing or a description. It is generally recognized that a variety of factors tend to make such statements unreliable, even where the witness is disinterested. From this certain practical problems arise – for example, how to differentiate reliable from unreliable statements and how to improve the reliability of such statements.

Up to this point there is no difference of substance between the orthodox definition of the problem and the perspective advocated in this essay. It can readily be conceded that for certain purposes it is reasonable to confine the definition of the problem to eyewitness identification of *persons* in *criminal* processes, so long as it is recognized that the processes of identifying other objects, by other means (such as voice or a combination of sense data) in other legal and similar processes are in many respects closely analogous. At the next stage, however, significant differences flow from the orthodox and broader perspectives. The former concentrates on identification statements as *evidence*, while the latter also includes the uses of such statements as *potential evidence* and as *information* relevant to a *variety of decisions* and other purposes. Similarly, if it is accepted that wrongful convictions are only one of the harmful consequences (*mischiefs*) that tend to flow from mistaken or dubious identification statements, then the population of *victims* is very substantially increased and attention is inevitably focused on *the whole process*, including events and decisions before and after trial. From this perspective it would be artificial to distinguish sharply between cases which are contested before a jury and other proceedings which take place before some other court or tribunal or which never reach the stage of a trial of the issue of identity. Even if a particular study concentrates on the trial stage in criminal proceedings, it will

almost certainly be necessary to consider the trial in the context of the process as a whole.

The substitution of an explicit and broadly gauged 'information model' for the narrower, typically implicit, jury lawyer's 'evidentiary model' has a number of practical and theoretical implications for future research, for public debate and for practical action relating to the topic of identification in legal processes. First, at the level of theory, the information model may provide a better conceptual basis for an integrated multidisciplinary approach to the topic. Secondly, this kind of perspective fits rather more easily with much contemporary research and writing about legal processes than does the evidentiary model. This in turn may help cross-fertilization between several bodies of literature that have to some extent developed separately. For example, it may point to connections between psychological literature about eyewitness testimony and sociological, legal, and other literature about plea-bargaining and guilty pleas or about juvenile or youth courts. It may also serve as a constant reminder of the enormous complexity of legal processes. Thirdly, this broader perspective may indicate new lines of research for psychologists and others; it may also suggest that some existing bodies of research and literature have a more direct bearing on the study of identification, and vice versa, than has hitherto been generally perceived. Thus, on the one hand, relatively little is known about such specific matters as decisions to hold, or not to hold, identification parades and the consequences of such decisions or about the special features of young people as objects of identification. On the other hand, the potential broader implications of identification have yet to be systematically explored. Fourthly, the 'information model' may provide the basis for a diagnosis and evaluation of the mischiefs of misidentification in legal processes that is at once more systematic and more realistic than that presented by the Devlin Report and similar policy documents. It may also open the way for a more free-ranging and imaginative approach to improving and inventing procedures, techniques, and rules for reducing the evils of misidentification in legal processes.

Since all this might seem rather ambitious, it is appropriate to end with some disclaimers. All I have tried to do in this chapter is to suggest that a fresh look needs to be taken at the problem of misidentification from a broader perspective than has generally been adopted in the past. A systematically constructed 'information model' (or series of models) has yet to be developed in this context, and this essay does no more than suggest some of the factors that might be taken into account in such an enterprise, for which, as a jurist, I have no special qualifications. Similarly a comprehensive, empirically based restatement of the problems of misidentification in England, or more generally, has not been attempted. Nor should anything that has been said here be taken as denigrating the very substantial advances in the study of the subject that have been made in recent years, especially by psychologists. All I have tried to suggest is that in so far as recent writings – as exemplified by the Devlin Report and the books by Yarmey, Loftus, and Clifford and Bull – have

been influenced by ‘the evidentiary model’ of identification statements, some of the tendencies and biases of the expository tradition of academic law and jury-oriented practitioners have crept into the literature; in so far as they have broken away from the narrow focus of this model – as in many respects they have – the development of a broadly conceived ‘information model’ might provide a general perspective on the subject which is at once systematic and close to the empirical realities of the operation of legal processes.

* This chapter was first published in 1983 in Lloyd-Bostock and Clifford (eds.), *Evaluating Witness Evidence: Recent Psychological Research and New Perspectives* and is reprinted by kind permission of the publishers, John Wiley and Sons. The context was a stock-taking of research into witness psychology; the primary audience consisted of psychologists interested in the field. This provided both a stimulus and an opportunity to restate my general criticisms of traditional approaches in simple terms and to provide a concrete illustration of a general approach. Only minor changes have been made to the text and footnotes. From 1983–90 the research and literature continued to accumulate; for references see Wells (1988). There were a few signs of a tendency to adopt broader perspectives: see, for example, Lloyd-Bostock (1988a, 1988b). However, none of these go as far as is suggested in this paper. I am grateful to Peter Twining for assistance with this paper and to Michael King, Brian Clifford and Sally Lloyd-Bostock for helpful criticisms and suggestions. [Since 1990 identification has continued to be an important focus of attention for empirical research. The literature is surveyed in Carroll and Seng (2003), Loftus and Doyle (1997), Wells (2002), Memon *et al.* (2003) and Bogan (2004). Most research has continued to focus on eyewitness identification evidence in contested jury trials (e.g. E. Stein (2003) at 295–6n.); see however G. M. Stephenson (1992), Lloyd-Bostock (2000b) and A. Roberts (2004). On other developments in Law and Psychology see above 96 n. 193.]

- 1 Devlin (1976).
- 2 Clifford and Bull (eds.) (1978), Loftus (1979), Yarmey (1979), Lloyd-Bostock and Clifford (eds.) (1983).
- 3 The editions discussed were Cross (1979); Salmond (1981); and Smith and Hogan (1978). The 6th edition of Cross (1985) contains a brief and somewhat dismissive discussion of probabilities at 149–51.
- 4 It might equally be referred to as Legal Realism, except that this term is often associated with a number of fallacies of which few, if any, leading Legal Realists were in fact guilty – such as the belief that talk of rules is a myth or that law can be defined in terms of prediction. [On the distinction between Realism as an historical movement in the United States and ‘realism’ as an idea see *GJB*, ch. 5.]
- 5 Broadening one’s perspective typically requires redefining the scope of the subject and the choice of a new organizing category – in this context, the substitution of ‘Evidence, Proof and Fact-Finding’ (or something similar) for ‘Evidence’. Wigmore divided the study of Evidence into two parts: the Science of Proof and the Trial Rules of Evidence; this, however, underemphasizes the procedural dimensions. See further, below, ch. 7.

- 6 Such theories have been attempted in the past, for example by Jeremy Bentham and John Henry Wigmore, but they have not caught on, partly because of the dominance of the Expository Tradition and partly because they are defective as theories in important respects. Nevertheless there is sufficient in the heritage of the literature on evidence and on judicial processes to provide a starting-point for a broader approach to the study of identification.
- 7 See Twining (1974, and (1985b) for fuller discussions.
- 8 See further below ch. 6.
- 9 Esp. Bentham (1827) and *TEBW*, ch. 2, 10; Loftus (1979), vii.
- 10 Loftus (1979), vii.
- 11 Kaplan (1968).
- 12 Loftus (1979).
- 13 Frank (1949).
- 14 The Devlin Report's analysis of the stories of Dougherty and Virag provides two case studies that deserve to become classics. Each follows the process from the initial crime through trial and appeal to the activities which eventually led to official acknowledgements that an error had been made and the payment of modest *ex gratia* compensation to the two men. The main focus in both accounts is on what went wrong and each reveals a catalogue of mistakes, accidents, and coincidences calculated to hearten inefficiency theorists, if no one else. In both cases misidentification played an important part, but they illustrate vividly how a series of mishaps and mistakes by different participants can combine to contribute not only to a wrongful conviction, but to failures to rectify errors on appeal and afterwards. The Report concludes that *R v Dougherty* was so badly bungled that it 'will never be a leading case on misidentification', whereas Virag's was nearly a 'copy book case' in which misidentification was not only the main factor, but 'was itself a case of some contributory errors'.

These two case-studies could be said to be based on an implied rather than an express, total process model. They clearly illustrate the complex interactions between events and decisions during different stages in the process, the contributions of different participants, and the importance of setting alleged examples of misidentification in the context of the story as a whole. However, it is debatable whether the rest of the Devlin Report gave adequate weight to all the implications of the lessons of these two case-studies – especially in respect of some of the crucial decisions taken prior to trial in each case. Moreover, as had already been observed, by failing to make adequate demographic estimates of the main factors and actors in the situation, the Report provides no adequate basis for judging the typicality of the cases of *Dougherty* and *Virag*, except perhaps in respect of the importance of misidentification as a source of error as against other factors.

- 15 Loftus (1979), 180–7.
- 16 Davis (1964). Davis himself made numerous pioneering contributions to 'administrative evidence'.
- 17 In England and Wales the number of civil jury trials is rarely more than 15 to 25 a year. In 1973, 47 per cent of those sent to prison were sent by Crown Courts, 43 per

cent were sent by magistrates, and 10 per cent were tried by magistrates and sentenced by Crown Courts. The great majority of these pleaded guilty. See generally Zander (1980), especially 1–5, 311–13. [See now Zander (2003).]

- 18 When a defendant can choose between summary trial or trial by jury, he is likely to be advised to opt for the latter in cases where there is a dispute about evidence of identity. Thus most contested cases of the kind in which a potential prison sentence is at stake are probably tried by Crown Courts. Against this must be set uncontested cases, cases tried before magistrates, in juvenile courts [now youth courts] and in other tribunals, and cases which never reach trial, but in which a suspected or accused person has suffered substantial vexation and/or expense. No reliable statistics about the extent of such cases are at present available.
- 19 The reasons for these differences are complex and cannot be explored in detail here; they are in part due to the differences in composition of the two bodies; in part to the narrowness of the traditional definition of ‘evidence’ as a subject; and in part to a generally heightened awareness that even questions about the admissibility of evidence at criminal trials can sensibly be discussed only when they are viewed in the broader context of some conception of criminal process as a whole. The differences in the definition of the problem in each report, including the way the terms of reference were drafted, reflected in large part a significant shift in perspectives.
- 20 Perhaps the *locus classicus* is Thayer’s dictum: ‘What was formerly “tried” by the method of force or the mechanical following of form is now tried by the method of reason’ (Thayer (1898), 198–9).
- 21 See above ch. 2.
- 22 For example, debates about the privilege against self-incrimination, about illegally or improperly obtained evidence, about the nature of forensic ‘probabilities’, and about the rationales of the hearsay rule and its exceptions.
- 23 See Twining (1973c).
- 24 Lindsay and Wells (1983).
- 25 Baddeley and Woodhead (1983).
- 26 Lasswell and McDougal (1967), McDougal and Reisman (1981).
- 27 Yarmey (1979).
- 28 E.g. Lindsay and Norman (1977); Loftus and Loftus (1976).
- 29 E.g. Willmer (1970).
- 30 Hain (1976).
- 31 Wigmore *Science* (1937), 258–9.
- 32 Clifford and Bull (1978).
- 33 Loftus (1979); Loftus and Ketcham (1983). ‘Radar Receivers’ which warn motorists of speed traps are now widely advertised in the United States. One advertisement states: ‘Although nine different errors have been documented for traffic radar, the most common source of traffic tickets is mistaken identity. It is hard to believe, but traffic radar does not identify *which* vehicle is responsible for the speed being displayed. It shows only a speed number and nothing else. The radar operator must decide who is to blame’ (advertisement in airline magazine, 1989).

- 34 Clifford and Bull (1978); Clifford (1983).
- 35 E.g. L. J. Cohen (1977, 1980a); Eggleston (1978, 1983); Tillers and Green (eds.) (1988), *passim*; *TEBW*, Appendix.
- 36 Woodruff (1957).
- 37 Hain (1976), 29.
- 38 Feeley (1979b).

What is the Law of Evidence?*

Introduction

Cross-cultural communication invites exchanges of stereotypes. A common kind of English joke involves trying to explain the mysteries of the game of cricket to foreigners. Conversely many foreign commentators treat cricket as a symbol of the English character. The English Law of Evidence is often presented as being even more bizarre and complex than the game of cricket. Anglo–American legal proceedings are often perceived as a kind of game, in which fair play and winning displace concern for truth and justice. The analogy has a core of truth in it; for English notions of fair play and American conceptions of due process have indeed played an important role in the development and survival of some of our technical rules of evidence. But like all analogies it can be pressed too far. Here, two important differences reflect central themes in this essay. On the one hand, I shall argue that our law of evidence is, in its fundamentals, much simpler than is commonly supposed. On the other hand, while I am prepared to give unqualified loyalty to the game of cricket, I share with most common lawyers a deep ambivalence about some important aspects of our law of evidence.

The purpose of this chapter is to try to demystify the modern English Law of Evidence by presenting a broad overview, shorn of the complexities and details that are the reason for its reputation. The standpoint is that of an expositor trying to give a clear and realistic overview of this branch of English law to newcomers to the subject, whether they be law students or lawyers trained in a different system. I shall deal only incidentally with my views on the question: What should be our law of evidence? My central contention is that our rules of evidence consist of a series of disparate exceptions to a single principle of freedom of proof and that the exceptions are less important in theory and in practice than is sometimes suggested. The first part of this thesis follows James Bradley Thayer, the great American scholar, whose view is widely regarded as forming the basis of our modern law.¹ The second part – the argument of exaggerated importance – is largely attributable to historical trends in the organization of litigation since Thayer's time, in particular the decline of the jury; the increase of judicial discretion in fact finding; and the growth in importance of tribunals and other arenas in contrast with the decline in importance of the contested trial.

The argument of exaggerated importance also reflects a difference in theoretical perspective on law. Thayer equated 'law' with binding rules created or authorized by state authority. Following Karl Llewellyn, I shall treat 'law' more broadly as a kind of *institution* which embodies not only rules, but also principles, procedures, practices, craft-traditions, devices, and ways of thought which are sufficiently established to be describable and which are specialized to performing a number of jobs or tasks in society.² The difference is mainly one of emphasis and perspective. Thayer treated questions of analysis of, argument about, and presentation of evidence as falling outside the sphere of the Law of Evidence. This narrow view of the Law of Evidence may be correct in terms of his positivist conception of 'law'. The broader view of the subject of Evidence and Proof within the discipline of law includes all of these matters and much more besides.

What is conventionally conceived as the Law of Evidence is treated here as one part of a broader subject: Evidence and Proof in Litigation.³ Each of these terms requires clarification.

Proof is the establishment of the existence or non-existence of some fact (a *factum probandum* or *fact in issue*) to the satisfaction of a legal tribunal charged with determining this fact in issue. The degree of satisfaction required is prescribed by the applicable *standard of proof*, for example, 'balance of probabilities' or 'beyond reasonable doubt'. Evidence is a means of proof. It has been defined as 'any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact'.⁴ The main examples of judicial evidence are statements by witnesses (testimony), things (real evidence), and documents presented to the tribunal as a basis for determining the issues of fact before it.

The Logic of Proof is concerned with the validity, cogency and appropriateness of arguments as the rational basis for persuasion towards making or justifying a decision or conclusion on a question of fact. From this perspective, both the facts in issue and evidence can be expressed in propositional form. An evidentiary proposition (*factum probans*) is *relevant* to a fact in issue (material fact or *factum probandum*) if it tends to support it or negate it, judged by the applicable principles of logic. The 'weight' or 'cogency' or 'probative force' of a single evidentiary proposition, or of a mass of evidence, refers to the strength or weakness of the support or negation. Questions of relevance (is there any connection?) and of weight (how strong is the connection?) are intimately related, but it is useful to keep them conceptually distinct.

'Litigation' in this context refers to formal proceedings to enforce the law or to pursue a claim in law through to a final determination by a court or other legally constituted tribunal. Litigation refers to the *total process* from the formal institution of legal proceedings (e.g. by the laying of a criminal charge or the issue of a writ) to a final order or act which makes the case *res judicata*. In practice, only a small minority of litigated cases involve a contested trial or a full hearing in court: a high proportion of civil claims are settled out of court or abandoned before trial; in the great majority of criminal cases the accused pleads guilty with the result that there

is no trial of contested issues of law or fact, although the court will typically have to determine sentence.⁵

In modern times many legal proceedings fall under the jurisdiction of specialized adjudicative tribunals which perform the functions of courts, in important spheres such as employment, industrial injuries, immigration, welfare, land and tax. The important distinction, in this context, is between *adjudication* by a supposedly impartial third party and other methods of dispute-settlement, such as negotiation, mediation and conciliation.⁶ In so far as these tribunals are called to determine questions of fact, they are concerned with matters of evidence and proof. Accordingly, questions arise as to how such matters are and should be regulated and handled. A realistic picture of litigation in England needs to include all the main types of proceedings under the jurisdiction of adjudicative bodies and all stages in such proceedings.⁷

This chapter is primarily concerned with the situation in England and Wales (Scotland has a separate legal system with a different legal tradition); but much of it applies to jurisdictions that belong to the 'Common Law' family of legal systems. There are two particular reasons for referring specifically to the United States: first, modern thought about Evidence owes much to American scholars, especially James Bradley Thayer and John Henry Wigmore.⁸ Secondly, some contrasts between the situations in England and the United States may help to illuminate the complex relationship between the law of evidence and the procedural and institutional contexts in which it operates.

The argument will proceed as follows: in the first part, Context, the subject of Evidence and Proof in Anglo-American litigation can best be understood in the context of (a) the diverse institutional and procedural contexts of litigation in the Anglo-American systems, including recent trends in respect of both; and (b) the underlying philosophical and ideological assumptions of Evidence discourse. In this essay these two contexts can only be sketched in very broad and simplified terms; paradoxically these sketches will underline a message of complexity: that litigation in England and the United States is complex, diverse and continuously changing. The task of this part will be to present a simple map of an exceedingly complicated terrain. In the second part, Thayer's theory of the Law of Evidence will be considered critically in the light of developments since his day. In the third part, a broader conception of Evidence and Proof in litigation will be sketched. It is claimed that this broader perspective can provide a deeper understanding and a more realistic picture of the actual operation of our institutions in respect of evidence and proof.

Context

The procedural context

An important book by a Yugoslav jurist, now resident in the United States, provides a useful theoretical framework for setting our subject in a broad context. Mirjan

Damaska's *The Faces of Justice and State Authority* develops a way of describing and comparing systems of procedure in modern Western legal systems in terms of three theoretical models (or 'ideal types').⁹ These relate to systems of government, structures of authority, and systems of legal procedure respectively. Damaska's three sets of distinctions can briefly be restated as follows.

Systems of Government can be characterized by the extent to which they approximate to or diverge from pure versions of 'the Managerial State', in which the role of government is to manage all important aspects of social life, and 'the Reactive State', in which the role of government is limited 'to provide a framework for social interaction'.¹⁰ This corresponds with familiar distinctions between 'interventionist' and '*laissez-faire*' ideologies of government. Most modern Western societies have hybrid systems of government (and mixed economies) which lie somewhere between the two extremes. Even the United States departs in important respects from the 'ideal type' of the Reactive State; whereas the United Kingdom, despite recent incursions on the Welfare State, is in important respects somewhat closer to the Managerial model.

Systems of State Authority can similarly be characterized in terms of a distinction between hierarchical and coordinate authority. A reasonably clear example of the former is a bureaucratic state apparatus run by *professionals*, who are in a *hierarchical* relationship to each other, and who purportedly make most important decisions according to *precisely defined standards*. Coordinate authority is characterized by extensive *lay* (non-specialist) participation, *single levels* of 'horizontal' authority and resort to *undifferentiated community standards*, rather than formal rules. Again most actual systems of authority are hybrids. However, there are clear examples in particular spheres: for example, the English jury closely fits the coordinate model in that it is composed of ordinary citizens, its findings are only exceptionally subject to review or appeal ('the sovereignty of the jury') and its decisions, within its allotted sphere, are governed by 'common sense'. Significantly juries do not, indeed cannot, give reasons for their decisions. This contrasts significantly with the lower judiciary in countries like Italy and France, where the personnel are trained officials, whose decisions even on questions of fact have to be reasoned and are subject to regular review by and appeal to higher authority.

The third distinction, between 'inquisitorial' and 'adversarial' *systems of procedure*, is also commonplace. But Damaska departs from common usage, which tends to be both ambiguous and vague, by distinguishing these categories in terms of purposes rather than treating them as different means to shared ends.¹¹ The purpose of an 'inquest' is implementation of state policy in order to solve a problem; the purpose of a 'contest' is the legitimated resolution of a single dispute between identifiable parties. It is a truism of procedural scholarship that it is misleading to equate Anglo-American procedure with 'adversary' proceedings or systems influenced by Roman Law with 'inquisitorial' proceedings. English criminal procedure, for example, can be interpreted mainly in terms of the model of 'inquest' with a few 'adversarial' glosses, especially at the stage of a disputed trial – an event which occurs in only a small minority of cases. Damaska goes further than this: he argues that it

would be surprising to find any modern state which had only one kind of procedural arrangement and, indeed, that examples of particular institutional arrangements which fit the 'ideal types' exactly are quite exceptional.¹² Most procedural arrangements, let alone most 'systems' of arrangements, are hybrids. Nevertheless these concepts, if used precisely, have considerable explanatory power.

These distinctions are, of course, potentially controversial; there is also scope for differences in interpreting and applying them to particular examples. That serves to underline the point that it is not possible to give an ideologically neutral account of a legal system. However, Damaska's central thesis may be less controversial and it is directly relevant to this essay. He argues that these different ideal types can combine in practice in a variety of ways: some combinations one would expect to be more 'comfortable', while others would almost inevitably give rise to serious tensions. For example, the Managerial State, hierarchical authority, and inquest fit together quite naturally; conversely there is likely to be regular tension between adversary proceedings and hierarchical authority. However, and this is the central point, there are many more workable combinations of relatively pure types than one might expect; many particular arrangements, as well as whole systems, represent mixes or compromises. For example, there is no necessary incompatibility between 'inquisitorial' procedure and a largely reactive state on the one hand, or a largely coordinate system of authority on the other.¹³ Many English tribunals are concerned with implementation of law relating to such matters as welfare, tax and immigration: cases typically come before them when a decision is challenged.¹⁴ There is in a sense a 'dispute' and hearings have some 'adversarial' characteristics. We live in a world of hybrids. The English law of evidence and the ideological, institutional and procedural context in which it is situated, can be explicated in such terms.

It is often said that the peculiarities of the common law rules of evidence are attributable to two factors: the institution of the jury and the adversary system of procedure.¹⁵ As a historical explanation of the origins and development of the law of evidence this is broadly true. However, as an explanation of its survival, and of its purported rationales, this can be misleading. In England, for example, such an account fails to explain the following features of the modern system:

- 1 The surviving traditional rules of evidence are mainly important today in respect of criminal proceedings. With a few exceptions, they apply to all criminal proceedings irrespective of whether these involve trial by jury, by lay magistrates or by professional judges.
- 2 Civil procedure in the court system is generally closer to the 'adversarial model' of procedure than is criminal procedure, but there are normally less than thirty contested civil jury trials per annum in England and Wales.¹⁶ The decline in importance of the law of evidence in civil litigation is, in part, to be explained by the decline of the jury. But the question arises how far the surviving rules of evidence can be explicated in terms of 'adversarial' features of procedure.

- 3 A very large proportion of litigation, in the broad sense in which it is used in this essay, today takes place outside the formal court system, in tribunals, in which many of the adjudicators are not qualified lawyers. There is a good deal of uncertainty in both theory and practice about the extent to which the technical rules of evidence apply to such proceedings.¹⁷ However, it is generally true to say that tribunals operate in a context that is much closer to a system of ‘free proof’ than either criminal or civil courts. Accordingly the question arises: What is the relationship between the law of evidence and adjudication by lay persons (i.e. non-lawyers)?

We shall see later that there is some doubt whether there is any justification for continuing to talk of one ‘Law of Evidence’ instead of a series of laws of evidence, which are significantly different for the three main types of litigation, viz. criminal proceedings, curial civil proceedings and proceedings before adjudicative tribunals.¹⁸ Without prejudging this important question, it is useful to underline the extent to which certain basic principles of procedure underlie all litigation. Adapting a recent formulation by Professor Sir Jack Jacob, the doyen of English proceduralists, one can summarize the most fundamental principles underlying English civil procedure as follows:¹⁹

- 1 *The principle of party autonomy*: subject to overall regulation by the Court, the parties and their lawyers retain the main initiative and control over the determination of the issues; the collection, selection and questioning of witnesses; and presentation of the suit (including negotiated settlement without approval or direction by the court). This principle is treated by most commentators as the main basis for distinguishing between ‘adversarial’ and ‘inquisitorial’ proceedings.
- 2 *The Court as umpire*: the role of the Court is ‘inactive, passive, remote, neutral, independent’.²⁰ This is the converse aspect of the active role granted to parties and their lawyers by the first principle.
- 3 *The principle of specialization of functions*, with quite sharp divisions of functions between decisions on questions of law, questions of fact, and questions of disposition (e.g. sentencing); and between the role of different participants at pre-trial, trial and appeal; and, in England, between the role of solicitors and barristers. One important example of such distinctions is that, in jury trials, questions of law and procedure are for the judge, but the final determination of questions of fact is for the jury. Determinations of fact are only exceptionally subject to review or appeal.
- 4 *The principle of orality*, especially in respect of argument and of the cross-examination of witnesses in open court. It is sometimes claimed that the ‘dialectical immediacy’ of oral presentation and confrontation is the best means of arriving at rectitude of decision on questions of fact and law. It is important to keep the idea of *dialectical* exchange conceptually distinct from that of *adversarial* autonomy – although, in practice, the two are often combined.²¹
- 5 *The principle of publicity* at the stage of trial and appeal. Bentham wrote: ‘Without publicity all other checks are insufficient: in comparison of publicity all other checks are of small account’.²² Trials held ‘*in camera*’ and restrictions on reporting of court proceedings are considered to be deviations from this principle and require justification.

Sometimes such restrictions become a matter of political controversy. On the other hand, *pre-trial* proceedings, both in civil and criminal litigation, generally fall outside this principle. For example civil pre-trial applications are held in private ('in chambers') and the arcane nature of pre-trial proceedings is a major point of concern about the fairness of our system of criminal justice. One reason why many disputants prefer 'alternative' methods of dispute-resolution such as arbitration, mediation and settlement out of court is that these are less public than judicial trials.

- 6 *The principle that adjudicative decisions should be based on the issues, the evidence and the arguments presented 'in open court'*, rather than on a judgement of the whole person or on personal general knowledge or on knowledge of particular matters relating to this case obtained outside the courtroom.
- 7 *The principle of procedural fairness*: this elusive idea, embodied in such notions as 'due process of law', 'the rules of natural justice' and 'procedural rights', has been the subject of much theoretical concern and has been a source of recurrent controversy, especially where considerations of fairness have been thought to conflict with 'rectitude of decision' or with efficiency in implementation of the law.

These principles form the theoretical cornerstone of civil procedure in the English court system. None of the principles is absolute; much doubt and controversy have surrounded the weight and extent that should be given to each of them and how far they are in fact respected in practice in different kinds of proceeding. Similar principles, in simpler form, characterize proceedings before most adjudicative tribunals. The same basic principles govern criminal proceedings except that, as was noted above, such proceedings diverge in some important respects from the 'ideal type' of an adversarial contest. There are two particular concerns that underlie the design and operation of provisions for procedure and evidence in criminal proceedings. They reflect important differences between the purposes, values and contexts of criminal and civil litigation. It is worth articulating these as distinct principles:

- 8 *The principle of the protection of the accused against mistaken conviction*:²³ the presumption of innocence, the standard of proof beyond reasonable doubt, and many specific provisions of criminal procedure and criminal evidence are explained and justified in terms of this principle. Controversy is sharpest when the principle is thought to conflict with the public interest in convicting the guilty and in preventing crime. The concern is not, of course, peculiar to the common law.²⁴ But many details of the common law of evidence need to be interpreted in relation to this principle and the tension between it and other concerns.
- 9 *The principle of the protection of suspects from illegal, unfair or improper treatment*. This principle relates especially to treatment of suspects by the police before trial and is a major point of intersection between the fields of evidence and procedure. Utilitarians may argue that this concern is subsumed under the general objective of minimizing 'vexation' to *all* participants in legal proceedings, including witnesses, parties to civil litigation, victims, lawyers and officials as well as suspects. Similarly, some civil libertarians claim that this principle can be subsumed under a more general principle of procedural fairness or due process or a general theory of procedural rights. However, protection of suspects from mistreatment is such a pervasive concern of criminal evidence that it is worth articulating it in the form of a specific principle.

The theoretical context

As we saw in chapter 3, the common law of evidence, and the perception of Evidence as a distinct field of study, were relatively late developments. Many of the technical refinements, which led to the perception of the Anglo–American law of evidence as being peculiar, developed in the period 1770 to 1830. Nearly all specialized secondary writings about the common law of evidence since Gilbert have proceeded on very similar assumptions that belong to a remarkably homogeneous intellectual tradition that may be called ‘The Rationalist Tradition of Evidence Scholarship’.²⁵ These assumptions relate, first, to the aims and nature of ‘rational’ adjudication and, secondly, to what is involved in ‘proving’ disputed matters of fact by ‘rational’ means.

The key ideas can be restated as follows: First, the central *purpose* of adjudication is ‘rectitude of decision’, that is the correct application of substantive law to facts proved to be true on the basis of relevant evidence presented to the tribunal. However, the pursuit of truth in adjudication has to be constrained by other, ‘extrinsic’ values. These subordinate ends, or side-constraints, were summarized by the utilitarian jurist Jeremy Bentham (1748–1832) in the classic phrase ‘vexation, expense and delay’;²⁶ non-utilitarians have expressed some of the central values in terms of ideas of ‘procedural fairness’ or ‘due process’.

Secondly, the pursuit of truth as a means to justice under the law is to be pursued by *rational* means. Evidence scholars have almost without exception adopted a conception of ‘rational’ fact finding that comes from a single philosophical tradition, English empiricism, as exemplified by Locke, Bentham, John Stuart Mill and, in modern times, A. J. Ayer. Recently debates within philosophy, about epistemology, induction and rationality have once again spilled over into discussions of judicial evidence. For example, some sociologically oriented and critical theorists have questioned the conceptions of rationality underlying the Rationalist Tradition; some go so far as to question the possibility of ‘rational fact finding’. On the other hand, some students of statistics and decision theory have contended that arguments about evidence, since it is concerned with ‘probabilities’, should in principle fit mathematical models of reasoning and decision making. In order to keep presentation simple, this essay will by-pass these theoretical debates and proceed on the basis that the Anglo–American Law of Evidence broadly fits the ideal type of the Rationalist Tradition.

In so far as this is correct, certain features of that tradition deserve attention. First, the idea that adjective law (evidence and procedure) is concerned with the correct implementation of substantive law (truth and justice under the law) fits well with the ideology of Liberal Legalism, exemplified by the classic notion of the Rule of Law. But it fits equally well (if not better) with Damaska’s ideal type of the managerial state in which adjudicators are bureaucratic officials charged with implementing state policy through the efficient application of precise rules. This need not surprise us; but it is significant in that it suggests that the idea that adjudication is concerned with the correct application of existing laws to true facts is shared by standard versions of liberal and socialist theories of law.²⁷

Secondly, civilian lawyers have pointed out that the set of assumptions embodied in the Rationalist Tradition fits civilian conceptions of procedure and evidence. Indeed, they ask, do they not fit the ‘inquisitorial’ systems of procedure better than ‘adversarial’?²⁸ If so, how is it that the Rationalist Model is a rational reconstruction of the underlying assumptions of *common law* discourse about evidence? A short answer is first that common law procedural arrangements deviate in many important respects from the pure adversarial model, especially in Damaska’s characterization; and, secondly, a great deal of our law of evidence is concerned with side-constraints on the pursuit of truth (what Wigmore called ‘rules of *extrinsic* policy’) rather than with upholding rectitude of decision. Thirdly, the history of the Anglo-American law of evidence is marked by a series of long-running debates. At one extreme, Jeremy Bentham argued that all binding rules of evidence should be abolished. At the other extreme, it has been argued that the law of evidence embodies both the accumulated wisdom of centuries of practical experience and some fundamental notions of procedural fairness, especially in respect of safeguards of persons accused of crime. The latter include the presumption of innocence; the right to silence and the privilege against self-incrimination; exclusion of evidence of character (or disposition – including evidence of past convictions); the hearsay rule and, in the United States, the exclusion of evidence that has been obtained by illegal or unfair means. Such debates are often portrayed as differences between ‘Right Wing’ proponents of Law-and-Order and ‘Left Wing’ or Civil Libertarian defenders of the rights of persons suspected of crime. The issues are much more complex than that. However, the debates do fit a recognizable pattern: they are, by and large, debates *within* a single intellectual and ideological tradition; they are repeated across time and across geographical boundaries: for example, they have been repeated, with local variations, in England, Scotland, the United States, Australia, Canada, India – and, indeed, in nearly all common law jurisdictions; similarly recent arguments about criminal evidence in England in the period 1972–85 can be found in almost identical terms in debates in the first half of the nineteenth century. Not surprisingly, the outcome has almost invariably ended in compromise, a ‘balancing’ of the interests of the community in enforcing the criminal law and in avoiding the wrongful conviction of innocent persons. From time to time the balance shifts in one direction or another, with a general trend towards the reduction in scope and importance of the technical rules of evidence. However, no common law country has yet implemented Bentham’s proposals for total abolition of the technical rules. One possibly surprising feature of those debates is that it is the proponents of ‘Law-and-Order’, generally regarded as conservatives or reactionaries, who claim to have reason on their side and who attribute the survival of the technical rules to the sinister economic interests of a privileged group, the legal profession.²⁹

Historical trends

The common law of evidence is a fairly clear example of Anglo-Saxon pragmatic evolution. Change has taken place more through case-by-case decision and piecemeal

legislative intervention than through radical or principled reform. It is beyond the scope of this paper to attempt to catalogue, let alone to analyse, the many factors that have contributed to the developments that have taken place over the past fifty years. Some of the more immediate and obvious ones have already been alluded to: changes in patterns of litigation, the growth of tribunals, shifts in political opinion and some specific theoretical developments, for example. Others, perhaps less obvious, but also important, such as the computer revolution, membership of the European Community and changes in the legal profession cannot be dealt with here. However, four interrelated trends deserve specific mention in this context: the decline of the jury; the simplification and ‘codification’ of the law of evidence; the trend towards discretionary norms; and revival of academic interest in the subject.³⁰

In nearly all common law jurisdictions except the United States, the jury has entirely or almost entirely disappeared from civil litigation. The general trend away from contested trials in criminal proceedings has led to a reappraisal of the rationale of the law of evidence, especially in respect of non-jury trials. However, it is important not to exaggerate the decline of the jury. First, the principle of the right to trial by jury in serious criminal cases is greatly valued in the Anglo-American system. For example, no major political party would advocate outright abolition of the jury in the United Kingdom and the *most important* contested criminal trials (though statistically quite small) are still tried by juries. The partial replacement of some jury trials by Diplock Courts in Northern Ireland is perceived as a symbol and a symptom of the continuing ‘emergency’.³¹ Secondly, although the *origin* of much of our law of evidence is to be explained in terms of jury trial, the *continuance* of some important doctrines is usually justified on a variety of other grounds. Thirdly, because lawyers, police officers and other professional participants have been trained in the jury rules of evidence, they continue to treat the contested jury trial as the paradigm. Similarly, recent debates about the reform of the law of evidence have been dominated and distorted by ‘jury thinking’.

Over the past century many common law jurisdictions have either codified the law of evidence or have put codification on the agenda. Among the most important examples is the Indian Evidence Act 1872, which was adopted or imitated in the colonial period in a great many jurisdictions that were formerly under British rule. Most of these survive today. The Federal Rules of Evidence are now the foundation of the law of evidence in nearly all American jurisdictions. In England there is a traditional resistance to outright codification, but a number of important statutes – notably the Civil Evidence Act 1968 and the Police and Criminal Evidence Act 1984 – represent a similar trend. Law reform agencies in Australasia and Canada and some smaller states have also been considering major legislative reform falling short of codification.³² All of these legislative reforms follow a general pattern: they purport to simplify, to narrow the scope of the rules of evidence and to move in the direction of substituting general principles and flexible standards for mandatory precepts. They differ in form and fall short of the extent of Bentham’s anti-nomian thesis, but they have gone a long way in the direction that he advocated.³³

There has also been a distinct trend away from strict technical rules towards more flexible principles, standards, guidelines, balancing tests and ‘rules of practice’. This is connected in part with the decline of the jury and the movement towards simplification and codification of the law of evidence. But it is also connected to broader trends. The reasons are complex and the process of change has been slow, but the trend can clearly be seen by comparing modern treatises on evidence with editions of the same work twenty or thirty years ago. This is made explicit by Colin Tapper, the editor of *Cross on Evidence*. Writing of the daunting task of taking over from Sir Rupert Cross he said:

[W]e both felt that the balance of importance of the law of evidence had shifted since the first edition was published in 1958. In civil proceedings the law of evidence had taken on a much less technical cast, and exclusionary rules have increasingly given way to the operation of discretion, guidelines and considerations of weight. The mainly matrimonial litigation which sustained most of the technicality is now a thing of the past . . . Conversely more emphasis has been placed upon the different types of proceedings in which the law of evidence may be invoked and upon the nature and operation of the discretionary exclusion of evidence.³⁴

This confirms that the general trend of change in the law of evidence has been consistently in the direction advocated by Bentham, but neither as systematically nor as rapidly as he would have wished. Later we shall have to consider how much of the surviving ‘law’ consists of mandatory precepts and whether these developments are compatible with the prevailing Thayerite view of the subject.

Finally, since about 1960, there has been a significant revival of academic interest in evidence after a long period in the doldrums. A new generation of evidence scholars has emerged from the shadow cast by the giants of the late nineteenth and early twentieth centuries. Debates about codification and reform stimulated both academic and political interest; adjacent fields such as forensic science, psychology and decision theory have developed rapidly;³⁵ there have been important developments in respect of the ‘new rhetoric’ of Chaim Perelman and his associates, the theoretical and practical applications of statistics to problem of proof and, most recently, in connection with legal semiotics.³⁶

The Thayerite view of ‘the Law of Evidence’

In the Anglo–American tradition there have been four principal attempts to develop an explicit general theory of the ‘Law of Evidence’.³⁷ Gilbert tried to subsume all the rules of evidence under a single principle, the ‘best evidence rule’; Bentham saw the existing technical rules as an illogical and indefensible morass, and he argued that there should be no binding rules at all within the framework of the Natural System of Procedure; Stephen tried to find a coherent rationale for the whole of the Law of Evidence in the principle of relevancy. Thayer admired Stephen’s enterprise but agreed with Pollock’s judgement that it represented ‘a splendid

mistake'.³⁸ Relevance was a matter of logic, not law and 'The law has no mandamus on the logical faculty'.³⁹ Thayer treated the rules of evidence as a mixed group of exceptions to a principle of freedom of proof. None of these four theories were purely expositions of existing law. Gilbert, Stephen and Thayer were rationalizers and systematizers who advanced creative interpretations of common law doctrine. Bentham considered that the technical rules defied rationalization as well as being indefensible. His theory was explicitly 'censorial' rather than 'expository'. Nearly all changes in the law of evidence since his day have been in the direction that Bentham recommended without going as far as he wished. However, nearly all modern writers on evidence in the common law would have accepted some version of Thayer's thesis and it has more or less explicitly provided the basis for most subsequent attempts to codify this branch of the law, including the Federal Rules of Evidence. Accordingly Thayer is the natural starting-point for interpreting the current position.

The Thayerite conception of the Law of Evidence has a strikingly narrow focus. It concerns processes *in court*; it is restricted to what facts may be presented to the court by whom and the manner of their presentation. It is not directly concerned with pre-trial and post-trial events. Many topics previously included in books on Evidence were exiled to procedure, pleading or substantive law, and in the United States to constitutional law. Underlying this conception are sharp distinctions between materiality, relevance, admissibility and cogency, each of which is governed by a different set of criteria. In constructing an argument on an issue of fact, a four-stage intellectual procedure has to be followed, with each stage belonging to a different sphere of discourse and allocated to a specific functionary. Thus in a contested jury trial the standard pattern is as follows:

- Q1 What are the facts to be proved? (Facts in issue, ultimate *probanda*, material facts are all synonymous in this context.) This is the issue of *materiality*; it is governed by *substantive law* and is to be determined by the judge.
- Q2 Of any fact offered as evidence or potential evidence: Does this fact tend to support or tend to negate one or more of the facts in issue? This is the question of relevance; it is governed by logic and general experience, and is a matter for the judge.
- Q3 Of any fact offered as evidence or potential evidence: Is there a rule or principle that requires that this item of relevant evidence should be excluded because *either*
 - (a) it belongs to *a class* of inadmissible evidence; *or*
 - (b) it would be contrary to the policy of the law to admit this in the circumstances of the case?

This issue of *admissibility* is governed by the law of evidence, and is a question for the judge.
- Q4 What *weight* should be given to this item of evidence (or the evidence as a whole) in the circumstances of the case? This is the issue of *evaluation of weight* (or cogency or probative force); it is governed by 'logic and general experience', and is a matter for the jury or other trier of fact. An alternative interpretation is that the criteria for weight of evidence are provided by probability theory, of which there are many versions.

Thayer's surgical narrowing down of the scope of the Law of Evidence was inspired ground-clearing. He then moulded what remained into a simple and coherent system, based on two principles:

- (1) That nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy of law excludes it.⁴⁰

The first principle (the test of relevance) is *exclusionary*, but is not strictly speaking part of the Law of Evidence: 'It is not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence.'⁴¹ The second principle is *inclusionary* and is the basic principle of the Law of Evidence. It mandates the reception of evidence supposed to be logically relevant to the facts in issue, subject to exceptions prescribed by law. The main role of technical rules of evidence is to prescribe the scope of the exceptions to the general inclusionary principle. Later we shall have to assess whether Thayer's formulation was too simple; but its great merit is that it is a magisterial simplification of what had traditionally been seen as a jungle of technicalities.

Thayer's explanation for the perceived complexity of the subject was essentially historical. While the exclusionary rules were logically exceptions to a general principle of inclusion, the historical process was different:

What has taken place, in fact, is the shutting out of the judges of one and another thing from time to time; and so, gradually, the recognition of this exclusion under a rule. These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exceptions to these rules.⁴²

These exceptions, and exceptions to exceptions, were justified on disparate grounds:

Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous in their effect on the jury, and likely to be misused or overestimated by that body; others as being impolitic, or unsafe on public grounds; others on the bare ground of precedent. It is this sort of thing, as I said before – the rejection on one or other practical ground, of what is really probative – which is the characteristic thing in the law of evidence; stamping it as a child of the jury system.⁴³

To these factors of *ad hoc* growth and diversity of reasons for exclusion was added the tendency for this branch of law:

to run over and mingle with other subjects, and to distress all attempts to clarify them . . . Rules, principles and methods of legal reasoning have taken on the color and used the phraseology of this subject, and thus disguised, have figured as rules of Evidence, to the perplexity and confusion of those who sought for a strong grasp of the subject. A bastard sort of technicality has thus sprung up, and a crop of fanciful reasons for anomalies destitute of reason, which baffle and disgust a healthy mind. To detail and scrutinize this topic of legal reasoning would tend to relieve our main subject of a great part of its difficulties and ambiguities.⁴⁴

We need not be unduly concerned here with borderline problems of classification of legal doctrine. But three points about Thayer's conception of the scope of the Law of Evidence deserve emphasis.

First, the core of Thayer's view of the Law of Evidence is concerned with the regulation of *reasoning* about disputed questions of fact at trial.⁴⁵ The Law of Evidence consists mainly of artificial limitations on free enquiry and ordinary reason in the process of arguing about and justifying decisions on such questions. Since the law, by and large, leaves judgements about relevancy and weight to logic and general experience, the 'excluding function' is the main role of the Law of Evidence.

Secondly, the converse of this last proposition is not the case. The law of evidence is only one of several grounds for excluding evidence. In litigation the issues are artificially and sharply defined in advance by substantive law and pleading; historians, physical scientists and others have no strong concept of materiality to limit their enquiries in such ways. More evidence is excluded on grounds of irrelevance than for any other reason; but relevance is a matter of logic, not law, even if lawyers tend to interpret relevance more strictly than most. It should also be remembered that Bentham, who wished to abolish all formal rules of evidence, was in favour of exclusion of evidence if it was irrelevant or superfluous or its adduction would have involved preponderant vexation, expense or delay judged by the standard of utility in the circumstances of the case.

Thirdly, Thayer indicates that questions of weight are not and should not be governed by rules of law, but are subject only to 'the ordinary rules of human thought and experience, to be sought in the ordinary sources, and not in the law books'.⁴⁶ In short, the law prescribes almost no rules for the evaluation of evidence.⁴⁷

Thayer pruned the Law of Evidence in order to provide it with a coherent rationale. His successors built on his general theory, including the distinctions between materiality, relevance, admissibility, and weight, but felt unable to sustain such a sharp distinction between evidence and procedure. Thus his pupil and disciple, Wigmore, presented his topical analysis of the system of evidence as follows:

The propositions of which evidence may be offered being thus given by the rules of substantive law and of pleading and procedure, and the law of evidence concerning itself solely with the relation between evidentiary facts and such propositions, the settlement of that relation obviously involves four distinct questions:

- 1 What facts may be presented as evidence? This is the question of admissibility.
- 2 By whom must evidence be presented? This is the question of burden of proof and, incidentally, of presumptions.
- 3 To whom must evidence be presented? This question involves the relation of function of judge and of jury, as respectively deciding upon law and fact.
- 4 Of what propositions in issue need no evidence be presented? This question includes the topics ordinarily termed 'judicial notice' and 'judicial admissions'.

The last three topics represent the borderline of what is in strictness the Law of Evidence. They involve and rest upon certain aspects of procedure that are independent of the evidential material. The question of who has the burden of proof, for example, is of a piece with the questions of who shall open and close the argument and of whether certain allegations require an affirmative or negative pleading. They form a part of a treatise on evidence merely because their material is chiefly evidential material and because their problems constantly have to be discriminated from the strictly evidential problems.⁴⁸

By and large subsequent treatise writers and codifiers have followed Thayer in accepting a fairly restrictive view of the subject, but have followed Wigmore in including all or most of the 'borderline' topics.

A modern gloss on the Thayerite view: Philip McNamara

In a valuable article an Australian lawyer, Philip McNamara, has reformulated and glossed the Thayerite view.⁴⁹ His summary statement of his suggested 'Framework of the Rules of Evidence' mainly articulates current orthodoxy and is worth stating in full.

Framework of the Rules of Evidence

Since the beginning of the 20th Century, it has been true to say that, judged by their practical effect, the common law rules of evidence fall into the following framework:

- 1 There is one *principle of inclusion*: evidence is admissible and required to be admitted if sufficiently relevant to the facts in issue between the parties to be capable of assisting a rational tribunal of fact to determine the issues. This rule determines whether, as a matter of substance, information can lawfully be admitted by the tribunal of law and used by the tribunal of fact.
- 2 There is one *principle of exclusion*: information is not admissible in any form from any witness for any purpose if its reception is contrary to the public interest. This is the only principle which predicates that, as a matter of substance, information cannot be received by the tribunal of law or acted on by the tribunal of fact.
- 3 There are four principal rules which, to the extent to which they are independent of the inclusionary rule, restrict the use of *relevant evidence* once admitted:
 - (a) Evidence of an out-of-court assertion cannot in general be tendered to be used for the sole purpose of supporting the credibility of a witness;
 - (b) Evidence of an out-of-court statement cannot in general be tendered to be used for the sole purpose of proving the truth of matters asserted by the statement;
 - (c) Evidence that an actor or witness formed, expressed or holds a particular opinion cannot in general be tendered to be used for the sole purpose of proving the existence of the matter opined;
 - (d) In a criminal case evidence of the misdeeds of a defendant not connected with the events charged cannot in general be tendered to be used for the sole purpose of authorising the inference that the defendant has a bad character and is therefore guilty of the crime presently charged.

It will be suggested that all but the second of these 'great canons of exclusion' are merely facets of the inclusionary rule.

- 4 There are rules as to the *competence and compellability of witnesses*: at common law, the parties and their spouses, children, lunatics, convicts and atheists were incompetent as witnesses. The competence and compellability of witnesses is now regulated by statute.
- 5 There are rules conferring *privileges* on competent and compellable witnesses to withhold relevant information: into this category falls the privilege against self-incrimination and the rules regulating legal professional privilege;
- 6 There are rules as to the *form* of evidence: for example, evidence of the contents of a document must, in general, be given in the form of the original document itself;
- 7 There are rules regulating *the manner of giving evidence*: for example, in general, a witness must give evidence on oath from memory and, in general, examination in chief cannot be conducted by the use of leading questions.
- 8 There are rules qualifying or restricting *the powers of the tribunal of fact*: into this category fall the rules as to presumptions, the rules as to burden and standard of proof, and rules of law requiring corroboration as a condition of conviction in certain criminal cases.⁵⁰ In addition, there is the fundamental rule that the tribunal of fact must act on the evidence alone and not on its own knowledge.
- 9 There are rules of law and of practice conferring powers or imposing obligations on trial judges: for instance, the judge presiding over a criminal trial by jury has a duty to warn the jury as to its assessment of the credibility of the evidence of certain witnesses (complainants in sexual cases, children and accomplices)⁵¹ and as to the manner in which it uses evidence which lends itself to a proper use and to an improper use. In addition, the judge in a criminal trial has the power to reject relevant evidence pursuant to the judge's obligation to ensure that the trial is fair to the defendant.⁵²

All but paragraph 3 of the first seven paragraphs can be interpreted as a modern restatement of the Thayerite view of the Law of Evidence. Apart from updating Thayer, McNamara glosses his theory in three main respects: First, instead of treating the main exclusionary rules and discretions as a series of disparate exceptions to the inclusionary rule, he suggests that '[r]elevant evidence is required to be rejected as a matter of law if and only if it is contrary to the public interest that it be received'.⁵³ While 'public interest' is an unruly horse and there is no closed list of categories of evidence which must be excluded on this ground, there are in fact only three established classes of evidence which are generally rejected irrespective of the use for which they are tendered, of the form of the evidence, and the qualifications of the witness. These are documents covered by 'public-interest immunity'; information tending to disclose the identity of police informers; and 'information as to the tenor of communications between estranged spouses aimed at achieving reconciliation of their marital differences'.⁵⁴

Secondly, McNamara introduces the notion of 'rules of use' and suggests that most evidentiary rules that are treated as rules of admissibility are more correctly interpreted as rules restricting the use of relevant evidence once it has been admitted.

For example, the hearsay rule prohibits the use of out-of-court statements to prove the truth of such statements (subject to numerous exceptions); but it does not prohibit the tendering of such statements for other purposes, for example, to prove that the words were spoken. The connection between admissibility and use is that certain categories of evidence will be excluded if they are tendered solely for a prohibited purpose. Apart from being a more accurate characterization of such rules, the concept of 'rules of use' serves as a reminder that they are not a spent force once questions of admissibility have been determined.⁵⁵ Rather they continue to restrict the freedom of the parties and the tribunal of fact in important ways at all stages of the trial.

Thirdly, McNamara differs from Thayer in treating presumptions, burdens of proof, and standards of proof as part of the Law of Evidence. In this respect he is in accord with nearly all writers on evidence including Wigmore, McCormick, and Cross, in that they deal with these subjects in books (and codes) of Evidence. This is sometimes justified on grounds of practical convenience rather than of conceptual purity. I shall suggest later that Thayer's attempt to draw sharp distinctions between rules of evidence, procedure, and substantive law was bound to fail and that for most practical purposes the classification of particular doctrines under one of those heads is of little or no importance.⁵⁶ However, there is one good conceptual reason for including at least most of these topics within this modified Thayerite view of the subject. From this perspective the Law of Evidence is that body of doctrine (rules plus) that regulates the reception and use of evidence in *argumentation* and '*internal determination*' of disputed questions of fact. Presumptions, burdens and standards of proof, corroboration, and, I would add, judicial notice all bear directly on these functions. Accordingly, they fit comfortably within a coherent view of the subject from this perspective.

The law of evidence is bedevilled by technical complexity and conceptual difficulties. Specialists may wish to take issue with some details of McNamara's reinterpretation of particular doctrines within his framework.⁵⁷ However, his restatement of the Thayerite perspective and his three main glosses all represent significant improvements on the original. The core of Thayer's insights is preserved, and some refinements are introduced that have considerable explanatory power. Accordingly, subject to one major caveat, this seems to me to be the clearest and most coherent modern formulation of the Thayerite thesis. Then I shall suggest an alternative perspective on the subject which suggests some important limitations to the Thayerite theory without necessarily invalidating it.

A further gloss on the Thayerite view: freedom of proof as the basic principle

The Thayerite theory can be interpreted as stating that the Law of Evidence consists of a series of disparate exceptions to a principle of free proof. McNamara's gloss suggests that those exceptions which deal with exclusion of evidence can themselves be subsumed under a single inclusionary principle, viz. that all relevant evidence

may and must be admitted unless to do so would be contrary to the public interest. His other categories (3–9) can also be interpreted as setting artificial constraints on free proof.

If a body of law is conceived as constituting a series of exceptions to a single principle, it would seem natural to start by elucidating the nature and scope of that principle, before considering the exceptions. What, then, is 'free proof'? In a separate essay I have explored in detail some alternative conceptions of this relatively neglected concept.⁵⁸ In the present context, however, one can give a relatively straightforward answer that fits the Thayerite view of the Law of Evidence. 'Free proof' means an absence of formal rules that interfere with free enquiry and natural or commonsense reasoning. In the adversary system, where the parties have primary control over what evidence is presented in what form and what questions are or are not put to witnesses, the freedom of enquiry by judge, jury, or other triers of fact is strictly limited. It is for the parties to determine whom and what they see or hear, but not how they evaluate and reason from evidence. This 'freedom' is largely the freedom of the parties and to a lesser extent that of the judge, jury or trier of fact. This is, of course, rather different from Bentham's model of the Natural System of Procedure, which was more inquisitorial in nature.⁵⁹ Nevertheless Bentham's attack on all binding rules of evidence, his 'anti-nomian thesis', provides the classic picture of a system of free proof in adjudication: no rules excluding classes of witnesses or of evidence; no rules of priority or weight or quantum; no binding rules as to form or manner of presentation; no artificial restriction on questioning or reasoning; no right of silence or testimonial privileges; no restrictions on reasoning other than the general principles of practical reason; no exclusion of evidence unless it is irrelevant or superfluous or its adduction would involve preponderant vexation, expense or delay in the circumstances of the particular case.⁶⁰

This conception of 'free proof' is entirely compatible with the Thayerite picture of the Law of Evidence. In this context, there are two main differences between Thayer and Bentham: first, Thayer's main concern was expository: to explain and clarify the existing law. Bentham's project was censorial: to criticize and make the case for the abolition of the whole body of binding rules. Secondly, whereas Bentham could find no justification for any formal derogations from the principle of free proof, Thayer believed that a few limited exceptions were justified on grounds of policy.

That they shared the same basic picture of the nature of the common law of evidence, while disagreeing about how much was worth retaining, is reinforced by Thayer's most important disciple. John Henry Wigmore divided the subject of judicial Evidence into two distinct parts: the Principles (or Science) of Proof, based on 'Logic, Psychology and General Experience' and the Trial Rules of Evidence.⁶¹ The Principles of Proof, said Wigmore, were anterior to and more important than the Trial Rules. It is worth looking at both elements in this claim in detail.

Wigmore argued that it was better to study the Principles of Proof *before* studying the rules and, while he controlled the curriculum, his students at Northwestern had to take his course on Proof (Evidence I) before moving on to the Trial Rules

(Evidence II).⁶² This was not merely because it seems sensible to study a basic principle before considering exceptions to it. More important, the Science of Proof is logically anterior to the Trial Rules, as well as providing their underlying rationales (in so far as they had a rational basis). Thayer had made essentially the same point when he claimed that his two basic principles of evidence (the exclusionary and inclusionary principles) were not so much part of the Law of Evidence as necessary presuppositions of a rational system of evidence.⁶³ The exclusion of irrelevant evidence was a matter of logic not law; and there was a general presumption in favour of admitting all relevant evidence. In order to have a clear view of the Law of Evidence one needs first to understand these two basic principles of proof.

Wigmore also claimed that the Science of Proof was more important than the Law of Evidence.⁶⁴ I shall argue below that Wigmore understated this part of his case, even on his own terms, and that, if one adopts a broader perspective, ‘the argument of exaggerated importance’ becomes even more telling. At this stage it is sufficient to make the point that both Wigmore and, only to a slightly less extent, Thayer saw clearly that the Law of Evidence was truly a law of exceptions, not only in the sense that it consisted of a series of derogations from a basic principle of free proof, but also that these derogations were really quite limited in number, scope, and practical importance.

Gruyère cheese and the Cheshire Cat: the argument of exaggerated importance

Thayer’s picture of the Law of Evidence has dominated Anglo–American discussions of the subject during the twentieth century. In this view our Law of Evidence is a series of disparate exceptions to a single principle of free proof. ‘Free proof’, in this context, covers questions of admissibility and use as well as evaluation.⁶⁵ Normally the phrase refers to freedom from regulation by artificial, binding rules (mandatory precepts); but even on the broader conception of ‘rules’ of evidence adopted here, the extent of that freedom is quite remarkable. Even in Thayer’s day the Law of Evidence was truly a law of exceptions; the silences were more extensive than the ‘noise’ that interfered with free consideration and evaluation of evidence and with principles of ‘natural reason’. Consider, for example, the following points:

- 1 The first principle of the Law of Evidence is that only relevant evidence may be admitted or heard. But the test of relevance – what tends to support or negate the alleged facts that are in issue – is a matter of logic and not of law.
- 2 There are almost no rules of *evaluation* of evidence, that is rules that direct what ‘weight’ or ‘cogency’ or ‘probative force’ is to be attached to any type of evidence.⁶⁶ One reason why it has been felt that it is appropriate to leave determinations of questions of fact to the jury is that such determinations are best made on the basis of ordinary practical reasoning and commonsense knowledge.⁶⁷ Connected to this the old *rules of priority* – so far as they ever existed – have almost completely disappeared. There used to be a rule

known as the 'Best Evidence Rule' which had the effect of creating a hierarchy of types of evidence: with official certified records at the top; then documents under seal, then written documents and so on.⁶⁸ Such distinctions can still be important in other parts of our law – as they are in most modern legal systems. But they do not now operate as rules of weight or evaluation.

Thus we have no principle that written evidence is to be given greater weight than testimonial evidence. We have no principle that testimonial evidence is to be given greater weight than circumstantial evidence. Nor is there any general principle of law that states that some kinds of witnesses are more credible than others.⁶⁹ Generally speaking, the weighing of evidence is left to the logic and common sense of the trier of fact in the particular circumstances of the case. There are a few exceptions, but they are quite minor.

3 Next, there are almost no *quantitative* rules – that is rules prescribing the number of witnesses or the amount of evidence required to prove something. The main exception concerns what we call *corroboration* – that is a formal requirement that the testimony of a witness must be confirmed by at least one other witness or by circumstantial evidence. What is very striking about our rules of mandatory corroboration is that they are very few in number and wholly exceptional. Examples include perjury; procurement of girls for prostitution; and, until 1988, facts testified by unsworn child witnesses (see the Criminal Justice Act 1988). In a few cases, for example in respect of the evidence of accomplices, the judge must warn the jury of the dangers of reaching a conclusion without corroboration, but the trier of fact may nevertheless decide on the basis of the evidence of a single witness.⁷⁰ The point is illustrated by the example of eyewitness identification. Although evidence of eyewitness identification is almost universally recognized to be highly unreliable, I know of no jurisdiction in the common law world which has a formal rule requiring that this type of evidence *must* be corroborated. Warning as to the dangers is accepted as enough.⁷¹

Since Thayer's time the rules of exclusion have been increasingly curtailed. The great bulk of those that survive relate to criminal and not to civil proceedings. I do not wish to deny that some of these rules are important both in theory and practice. Some, such as the rules excluding coerced confessions and evidence of prior convictions, also have important symbolic and educative value in that they exemplify and reaffirm important procedural principles (due process; judge the act, not the actor; the presumption of innocence). Some significant categories of evidence are excluded some of the time, but it is only a tiny proportion of all evidence. However, I wish to suggest that even the limited Thayerite view encourages a tendency to exaggerate the importance of rules of evidence in litigation as a whole.⁷²

On to this formalist account of our law, conceived in terms of rules, I wish to superimpose a realist gloss, which emphasizes the way important decisions are taken in practice in actual legal processes. Let us for a moment resort to metaphor. The Thayerite metaphor is of a great silence punctuated by spasmodic noises of varying duration and intensity or of a piece of Gruyère that consists of more holes than cheese. The realist metaphor is visual. In one of our classics of literature, *Alice in Wonderland*, one of the characters is the Cheshire Cat who keeps appearing and

disappearing and fading away, so that sometimes one could see the whole body, sometimes only a head, sometimes only a vague outline and sometimes nothing at all, so that Alice was never sure whether or not he was there or, indeed, whether he existed at all.⁷³ In practice, our rules of evidence appear to be rather like that.

First, as you might expect, the rules are often ignored or broken or waived in practice. In civil proceedings some or most of the rules may be expressly or impliedly waived by the parties. In criminal cases it may be tactically dangerous to make technical objections; and in magistrates' courts, which try over 95 per cent of our minor criminal cases, it is a brave lawyer who raises technical points on the law of evidence.⁷⁴

Next, there are other factors than non-observance in court. Much more important is the fact that only a tiny percentage of cases ever reach the point of being contested in proceedings in which the rules of evidence are meant to apply. In recent years there have been less than thirty contested civil jury trials per annum in England and Wales. And much less than 10 per cent of contested criminal trials are tried by juries – although these are the most serious and important ones. Just as significant is the fact that only a tiny percentage of cases ever reach the point of a contested trial: of civil cases, in which formal proceedings have been started, the vast majority are settled out of court. Similarly, and this is an important difference between the Anglo-Saxon and continental traditions, where the accused pleads guilty, there is no trial. Between 60 and 80 per cent of criminal proceedings (the figures vary in different courts) culminate in guilty pleas.⁷⁵

The law of evidence casts a shadow over pre-trial proceedings in ways which are imperfectly understood and hardly documented. Take, for example, a fairly ordinary case of someone suspected of shoplifting who had several previous convictions for this and other kinds of criminal offences. Generally speaking, those previous convictions may not be used at trial as evidence of his guilt on this occasion, if he pleads not guilty.⁷⁶ But what effect does this rule have on other parts of the process? During the process of investigation his criminal record may be a key piece of information in making him a suspect and in guiding the police enquiries. At the moment when a decision has to be made whether or not to prosecute him, the information will probably be available to the prosecutor, who should discount it in assessing the likelihood of obtaining a conviction in a contested trial, but who may nonetheless treat it as relevant for other purposes.⁷⁷ The same bit of information will probably be relevant to a series of other pre-trial decisions, including the accused's decision whether or not to plead guilty, and the trial strategy of both prosecution and defence. If he pleads not guilty, but is convicted on the basis of admissible evidence presented to the court, the information about his prior record is produced (along with other general background information) as an important element in determination of sentence and it may be of practical importance in many other post-trial decisions, for example, whether and when he might be released on parole. Thus in a single, routine example of criminal process the same item of information may be inadmissible evidence for the purpose of determining guilt,

may be discounted in some pre-trial decisions as potentially inadmissible evidence, but may play an important and legitimate role in a number of other important decisions in the total process. Often the exact nature of that role may be difficult to pinpoint.

Finally, a very great deal of our administration of justice does not take place in courts of law, but in administrative tribunals, before arbitrators, courts martial, alternative dispute processes, and the like.⁷⁸ Here the Cheshire Cat image of the Law of Evidence really comes into its own. For in many such proceedings either the formal rules of evidence do not officially apply, but nevertheless exert an influence on the proceedings; or the tribunal is guided but not bound by the rules of evidence; or they exert a shadowy influence on the ways of thought and styles of argument. It is not uncommon for a barrister to arrive at a tribunal dealing with wrongful dismissal or welfare matters unsure whether all or any of the strict rules of evidence will be applied. In many of these arenas something close to a system of free proof operates a great deal of the time. The courts exercise a narrowly circumscribed supervisory jurisdiction over these tribunals, but generally speaking this does not extend to appeals against determinations of fact.

So far I have argued that our Law of Evidence consists of a rather limited and diverse mixture of exceptions to a principle of free proof, especially free evaluation of evidence; that the restricted group of surviving rules only apply in their full rigour in contested jury trials – which are a tiny part of all litigation; and even in such trials they are not always strictly observed. I have further suggested that a false impression of the nature and importance of the subject is given by the Evidence scholars. It is not only foreigners who are given a false impression; rather it is that we systematically mislead ourselves and our students.

Why should this be so? The key lies in changing conceptions of legal scholarship. We have seen that in criticizing the law of evidence in his day, Bentham was attacking mandatory precepts excluding *classes* of evidence and of witnesses. He was against formal regulation, but this did not preclude excluding evidence in particular cases on grounds of irrelevance, superfluity, or preponderant vexation, expense or delay. Thayer's conception of the 'Law' of Evidence can reasonably be interpreted as extending beyond mandatory precepts to include general principles and flexible standards. What was striking about his perception was the narrowness of the scope of the Law of Evidence and the limited scope of this body of exceptions to the principle of freedom of proof. The general tendency of change since his time has been to erode this body of exceptions still further. On this view, Thayer was essentially correct, but he did not go far enough. From a broader perspective, the Thayerite Law of Evidence should be seen as only one small part of the subject of Evidence and Proof in litigation. From this point of view far too much attention has been paid to a limited number of 'paper rules' to the neglect of a number of topics of equal or greater theoretical and practical importance, such as what is involved in evaluating weight or the meaning and function of standards of proof and other standards for decision⁷⁹ or the nature of free proof.

The argument of exaggerated importance might be interpreted as leading to a version of ‘rule scepticism’ or ‘radical indeterminacy’. This would be a mistake. The argument, as it applies in England, can be restated in four propositions:

- 1 The Law of Evidence is at least as remarkable for the extent of the matters which are *not* governed by formal rules or other legal norms (the silences) as for the matters which it does address.
- 2 The modern law of evidence contains few, if any, mandatory precepts; many of the most important surviving doctrines are more accurately described as flexible standards, guidelines or balancing tests.⁸⁰
- 3 The law of evidence generally only applies in full force and directly to decisions by adjudicators (in their role as filters and ultimate triers of fact) in contested criminal jury trials and appeals therefrom. Such decisions represent a tiny and unrepresentative portion of important decisions in litigation.
- 4 Such norms as do survive are frequently waived or ignored or not treated as applying in full force (or at all) to many important decisions in litigation. Even where a rule of evidence has been found to have been breached, e.g. evidence has been improperly admitted, this is only exceptionally treated as a sufficient ground for reversal on appeal. Strong ‘rule scepticism’ – the belief that ‘talk of rules is a myth’⁸¹ – would involve a further proposition:
- 5 (a) Even those ‘rules’ of evidence which are claimed to survive do not in practice limit the freedom of adjudicators to decide as they please.

A modern variant of ‘rule scepticism’ is said to be ‘the radical indeterminacy thesis’. This might be interpreted to apply in the present context as follows:

- (b) Every rule of evidence is open to a variety of interpretations from which any interpreter is free to choose at will.

Sometimes ‘rule scepticism’ is attributed to ‘American Realists’, such as the young Karl Llewellyn, and ‘radical indeterminacy’ is attributed to leading members of the American Critical Legal Studies Movement. Such attributions are, in my view, generally unwarranted and misleading.⁸² In order to avoid similar misinterpretations it is necessary to make it clear why the argument of exaggerated importance is different from and does not involve commitment to 5(a) or (b). In particular, it does not imply the proposition that all rules of evidence are ‘radically indeterminate’ nor the proposition that adjudicators are free to decide as they please. Nor does it follow from the argument that decisions taken in ‘the shadow’ of the ‘trial rules of Evidence’ are not and should not be influenced by these doctrines.

First, the argument of exaggerated importance only claims that a misleading impression has been given about the *extent* of surviving mandatory precepts in the Law of Evidence. For example, the hearsay rule (even if interpreted as a rule of use) still serves to exclude a significant amount of potential evidence, especially in criminal cases. Much of the surviving doctrine relating to competence and compellability of witnesses, privilege, prior convictions, and some of what remains of corroboration can similarly be interpreted as general mandatory precepts in this

sense. It is reasonable to treat the duty of the judge to warn the jury about the dangers of identification evidence or the credibility of certain classes of witnesses (e.g. accomplices) as involving mandatory precepts even though they impose no duty on the ultimate triers of fact to ignore or disbelieve such evidence.⁸³ The crucial point is that, as a matter of doctrine as well as practice, the scope of such formal, technical mandatory rules is really quite limited.

Secondly, a very high proportion of surviving evidence doctrine consists of flexible standards, balancing tests and other norms that involve the exercise of judgement in the particular circumstances of the case. Thus, the Police and Criminal Evidence Act substituted a flexible standard of reliability in the circumstances for a much more formal test of involuntariness⁸⁴ subject to a complete exclusion of confessions obtained by oppression. The similar fact rule has been interpreted in a way that involves balancing the likely prejudicial effect against the probative value of this evidence in the context of this case.⁸⁵

Thirdly, some may challenge as over-inclusive McNamara's claim that there is only one principle of exclusion based on the public interest.⁸⁶ But, in so far as it is correct, 'public interest' is a notoriously vague term and the general tendency has been in the direction of balancing 'public interest' and other considerations in a specific context.⁸⁷ Again, English law has rejected a general rule excluding evidence obtained by illegal or improper means, but has left this to the residual discretion of the trial court to exclude evidence to ensure that the trial is fair.⁸⁸

Fourthly, in addition to this general tendency to move towards more flexible norms, there is growing recognition that some 'rules' of evidence are either so vague or so unworkable as not to deserve to be called rules. The 'Best Evidence Rule' and the doctrine of 'Res Gestae' have been well described as 'evidentiary ghosts'.⁸⁹ Another example is the 'Opinion rule' which prescribes that non-expert witnesses must confine themselves to relating facts within their personal knowledge and their opinions or beliefs about the facts, based on experience are to be excluded. However, it is generally recognized that a sharp distinction between 'facts' and 'opinions' is conceptually dubious and impossible to maintain in practice. Accordingly, it cannot be treated as a rigid rule, and in practice a good deal of leeway is given to witnesses in this regard.⁹⁰

The list could be extended. The central point is that the modern English Law of Evidence, in respect of both rules of auxiliary probative policy and of extrinsic policy, is much closer to what Bentham advocated than has been generally recognized. Galligan puts the matter well:

Bentham did not argue that rules be replaced simply by discretion, but rather by discretion structured through guidelines. Indeed, Bentham can be seen as a precursor of the lively debate of recent years as to the best mix of rules and discretion in any area of official decision-making, and his case for structured discretion has many supporters. It has come to be recognised, indeed, that guidelines can operate in different ways, ranging from factors to take into account as a matter of prudence, to factors that must be

considered, through to instructions that have the force of rules except that the judge has the discretion to depart from them for good reasons. Considering the different forms and force of guidelines, it is a mistake to draw too sharp a distinction between rules on the one hand, and standards of lesser force and specificity on the other. Strict rules with an all-or-nothing quality are likely to have a minor role in any context of practical decision-making, and evidence is no exception. Decisions can normally be regulated without recourse to rules in a strict and narrow sense, and it is to be remembered that Bentham's strictures were against rules only in that sense.⁹¹

Galligan's statement provides a useful basis for the third reason for distinguishing the argument of exaggerated importance from rule-scepticism and radical indeterminacy. It does not follow from the proposition that the Law of Evidence is largely discretionary that in determining disputed issues of fact judges, other triers of fact and appellate courts are 'free to decide as they choose'. Discretion, as Galligan and others have argued, is not to be equated with arbitrariness:

On the assumption that one's choices must be reasoned, discretion consists not in the authority to choose among different actions, but to choose amongst different courses of action *for good reasons*. The course of action cannot be separated from the reasons, and therefore the standards on which it is based. If indeed the standards are settled in advance (and there are often good reasons why they should be) the decision must be made according to these terms and an appropriate course of action will follow.⁹²

It is central to the ideas of the Rationalist Tradition that adjudicative decisions on questions of fact (and I would argue other important factual determinations in litigation) should, so far as is feasible, be the subject of argument, justification and evaluation according to rational standards. What is striking about such decisions is the extent to which they are structured in a standard way. More than in most forms of enquiry and decision making there are norms governing how the issues should be framed, what constitute valid and invalid reasons, how the weight or cogency of reasons is to be evaluated, and what are the standards for decision in a given context. Not only juries, and those who guide and address them, but all adjudicators are subject to essentially the same prescriptive model of reasoning. Moreover, aiming for rectitude of decision in respect of determinations of fact is not only an obligation of adjudicators but also of other officials charged with making important decisions in litigation – including, for example, prosecutors, administrators, sentencing authorities, appellate courts and so on.⁹³

What is the source of these prescriptive standards of validity and cogency in reasoning? The answer given by the Thayerite view is as follows: the framing of factual issues for determination – the question of materiality – is governed by substantive law; the question of validity (what constitute admissible reasons) is determined primarily by ordinary canons of practical reasoning, subject to the exceptions prescribed by the Law of Evidence in the form of principles, standards, guidelines and a few mandatory precepts. In the case of adjudicative decisions, the

standards for decision are incorporated in the standards of proof, which are also conventionally classified as forming part of the Law of Evidence. Various norms governing the manner, form and order of presentation and argumentation about evidence are allocated, somewhat randomly, to Procedure and Evidence.

The Thayerite view of the Law of Evidence, and its modern glosses, fall four-square within the Rationalist Tradition. His concept of the Law of Evidence as being concerned essentially with norms of reasoning provided the basis for rationalizing, systematizing and simplifying the subject. The argument of exaggerated importance does not fundamentally challenge this perspective nor is it seriously subversive of aspirational rationalism. However, it does suggest a number of ways in which the Thayerite view might be reinterpreted and modified.

First, if the primary focus of attention is to be reasoning about questions of fact, then it is surely unduly restrictive to concentrate solely or mainly on those norms which artificially derogate from general canons of reasoning appropriate to this context. That is to exaggerate the importance of the Law of Evidence relative to the other sources of norms which structure, guide and regulate argumentation about questions of fact. A simple way of doing this is to expand the conception of 'law' in this context to include all such norms – including the area designated by Wigmore as 'the logic of proof'. In this view, because the test of relevance is logic, it does not follow that it is not 'law'; because there are almost no positive rules governing weight or cogency, it does not follow that the applicable criteria do not deserve to be studied and debated as part of the subject of evidence within the discipline of law; because validity and cogency of reasoning in this context is based in large part on some very general principles of political morality, such principles deserve to be explicitly treated as forming part of this branch of 'the law'. In this view, Bentham's *Rationale of Judicial Evidence* is indeed a law book and the Law of Evidence is a sub-discipline of the general subject of 'legal reasoning' or 'lawyers' reasonings'.⁹⁴

So much for the normative aspect of the Law of Evidence. The argument of exaggerated importance also has a 'realist' dimension. It reminds us that in order to understand this branch of the law in action one needs to consider all the important decisions that it affects, directly or indirectly, or fails to influence significantly when it is supposed to do so. Who in fact invokes, uses or ignores 'the law' of evidence in what context, for what purposes with what results? Such questions are an essential part of understanding and evaluating this branch of the law for the purposes of study, practice and reform. In so far as particular norms are ineffective, incomprehensible, offend the common sense of particular participants or have side-effects considered to be undesirable, such factors need to be taken into account in evaluating them as well as the aspirational values that they purport to serve. Conversely some doctrines may have direct or indirect, unperceived or unintended consequences that may be of positive value. Disappointingly little empirical research has been done in this area and some of the most important questions (e.g. about the actual operation of prejudicial effect)⁹⁵ are notoriously difficult to research. The 'realist' argument

demands that these questions be addressed and some sort of assessments made, even if they fall short of scientific findings.

One law of evidence?

It is sometimes suggested that we have not one Law of Evidence, but a series of Laws of Evidence and that this needs to be recognized in legislation, in judicial development of the law, and in academic treatments.⁹⁶ Support for this view can be found in four rather different kinds of argument.

First, criminal, civil and other curial proceedings exist for different purposes and the values underlying the rules of evidence in each context should be fitted to these purposes.

Secondly, there are in fact many differences of detail between criminal and civil evidence, and between the Law of Evidence as it applies in courts and other tribunals. In particular non-criminal evidence doctrine is generally less extensive than criminal evidence.

Thirdly, the kind of ‘total process’ perspective that has been advocated in this essay leads to the conclusion that determination of the factual component of non-adjudicative decisions needs a greater differentiation between the contexts and roles of each kind of decision. For example, different standards for decision may be appropriate for decisions to prosecute, determinations of innocence or guilt, sentencing, appeal, parole and so on. Similarly the criteria of relevance and rules of admissibility may vary according to the kind of decision.

Fourthly, as we have seen, not only is it difficult to draw and maintain a sharp distinction between ‘evidence’ and ‘procedure’, but procedural and evidentiary issues are intimately related both in theory and practice. Accordingly, if evidence is to be reintegrated with procedure, then the Law of Evidence needs to be disaggregated and redistributed among the different sub-divisions of procedure. For the purposes of legislation, exposition, and education, evidentiary issues and doctrines should be treated as sub-branches of the different branches of procedural law.

In England there has been a discernible tendency in this direction. We have, for example, the Civil Evidence Act 1964 and the Police and Criminal Evidence Act 1984; such practitioners’ ‘bibles’ as *The White Book*, *Archbold*, and *Stone’s Justices’ Manual* incorporate the applicable rules of evidence; some, but too few, tribunals ‘codify’ the applicable provisions of evidence in their rulebooks; not only police training but many academic courses concentrate almost exclusively on Criminal Evidence; and such tendencies are also observable in the academic literature.⁹⁷

There are clearly often good practical reasons for disaggregating criminal and civil and other aspects of the Law of Evidence for particular purposes. There are also reasons for regretting the artificial segregation of Anglo-American Evidence scholarship from adjacent fields of study. The question remains whether there is any justification for retaining Evidence as a specialized field of study within the discipline of law.

It might be argued that we should defer to the contingent fact that there is a well-settled field with established specialists, entrenched courses and an extensive literature. Like it or not, Evidence as a subject is here to stay. Furthermore, tearing the seamless web is inevitably a somewhat arbitrary business and the distinction between Evidence and Procedure is no more artificial and uncomfortable than the separation of Tort and Contract, or Real and Personal Property. There are, however, some more positive reasons for continuing to treat Evidence and Proof in Litigation, and the Law of Evidence as part of that subject, as a worthwhile focus of attention.⁹⁸

According to the modified Thayerite view explored in this essay the Law of Evidence is primarily concerned with reasoning about questions of fact. I have argued that we should treat the logic of proof and the notion of free proof as part of the 'law' of evidence – or at least as necessary preliminaries to its study. What is striking about adjudicative determinations of fact – by tribunals, criminal juries, magistrates and judges in civil cases – is that normative theory lays down almost uniform norms for structuring and evaluating the validity and cogency of arguments. The *concepts* of materiality, relevance, admissibility, cogency and standards for decision apply not only to adjudicative determinations of fact, but to all official decisions in which 'rectitude of decision' in respect of factual issues is an aspiration. There is thus a single paradigm for constructing, reconstructing, and evaluating arguments in respect of such determinations. Some elements of that paradigm are controversial – as is illustrated by the probability debates or the tensions between holism and atomism – but there is a consensus within aspirational rationalism that the general principles of commonsense reasoning apply, subject only to a relatively few technical limitations in different contexts.

The technical rules of evidence are not only exceptional, even in the unrepresentative context of the contested criminal jury trial, but these technical rules are also best understood as *exceptions* to a principle of free proof which itself can be explicated in terms of the basic concepts of the logic of proof. Similarly, while standards for decision, such as the criminal and civil standards of proof, may vary according to context, their function and logic remain fairly constant.

It may be objected that different values apply to civil, criminal and non-curial proceedings and the suggested paradigm for rational fact-determination does not allow for this. This is not correct. The paradigm postulates the aim of rectitude of decision. In some contexts this purpose is overridden by other values – such as preservation of state security – and this is the rationale for 'rules of extrinsic policy'. In some contexts a high value is placed on avoiding misdecisions of one kind rather than another – for example, giving a higher priority to avoiding the risk of mistaken convictions rather than mistaken acquittals. Such purposes are furthered not only by standards for decision, such as the presumption of innocence and the criminal standard of proof, but also by 'rules of auxiliary probative policy', such as the exclusion of, or mandatory warnings about, classes of evidence considered to be prejudicial or unreliable. Nothing in the paradigm postulates that rectitude of decision is the only or a paramount value in all contexts. What it does

is identify what is involved in making valid and cogent arguments when this is the objective.⁹⁹

Law for whom?

Whose behaviour and expectations are affected by those norms that form the Law of Evidence broadly conceived? Even on the narrow ‘trial rules’ view, several categories of participants are affected in quite complex ways. In the contested trial the focal point is the judge, in her multiple role of filter, umpire and guide, and the jury as ultimate trier of fact. Norms which are standards for decision, such as the standards and burdens of proof, directly concern the jury as ultimate triers of fact in the way that exclusionary rules do not. Bentham’s ‘admonitory instructions’ are directed by the legislator to the trier of fact (via the judge in the case of the jury trials). Even with a single focal point there are many satellite standpoints: the criminal investigator’s role is not merely to ‘solve the problem’ to his own satisfaction, but to collect sufficient potentially admissible evidence to secure a guilty plea or conviction in the event of a contested trial.¹⁰⁰ Barristers and other advocates need to have the ‘trial rules’ at their fingertips both in preparing for trial and in making instant tactical and other decisions, for example whether to put or object to a certain question. The actions of many other participants take place in the shadow of a potential trial, including ‘the trial rules’ – they have to *anticipate* decisions directly affected by evidentiary norms.

Thus the ‘trial rules’ affect behaviour and expectations before as well as at trial. One of the paradoxes of academic treatments of the Law of Evidence is that while the main *arena* for action is conceived to be the contested trial, one of the most important *sources* of authority and examples is appellate decisions. The main staple for classroom discussion, treatises, academic commentary, and even debates on reform is the Law Reports rather than trial records. Ironically, a ‘realist’ justification is sometimes advanced for this. The Hard-nosed Practitioner, and his or her academic counterparts, suggest that the main practical significance of the law of evidence for the trial lawyer is to lay the basis for appeal by ‘creating a record’. When an appellate court is inclined to reverse a decision on the facts at first instance it needs a good legal justification for so doing; the law of evidence is the main source of technical pegs on which to hang such appeals. One version of this view is elaborated in a leading American casebook on evidence as follows:

Every experienced trial lawyer realizes as he or she goes into a litigation that his cause may not prevail at the trial level and that his client may wish to appeal to a higher court if, in counsel’s opinion, errors occurring at trial contributed significantly to the unhappy outcome. An experienced trial lawyer knows, therefore, that he must be in a position to show a reviewing court precisely what happened during the trial (and perhaps also at any important pre-trial and out-of-court hearings or conferences). It follows that a lawyer must do two things at once – he must operate at two quite different levels – as he goes about the trial of his case. First, he must bend every proper effort to the winning

of his client's case at the trial level, which means, essentially, that he must persuade the factfinder – judge or jury – of the rightness of his cause. Second, because counsel can never be absolutely certain of victory at the trial level, he must do everything he can to generate a record of the trial that will serve to convince a reviewing court that justice did not prevail in the court below.¹⁰¹

In a brilliant forty-page Appendix Professor (later judge) Jon Waltz gives a lucid and revealing account of what is involved in 'making the record'.¹⁰² No doubt, this is a valuable way of sensitizing potential trial lawyers to one of the main uses of the Law of Evidence at trial. It also serves as a reminder that both appellate and trial courts cast a shadow over earlier parts of the process *and* that the Law of Evidence has a potential role to play after trial or even final appeal – for instance, in decisions to reopen an alleged miscarriage of justice in the light of new evidence. However, this kind of 'realistic' treatment is not completely immunized from jury-thinking and appellate court-itis. It concentrates on appeals from contested jury trials and the potential use of the law of evidence to secure a reversal. In England the number of appeals against conviction by Crown Courts is just over 1 per cent and the success rate is very low. The percentage of civil appeals from the Queen's Bench Division and the success rate are both slightly higher.¹⁰³ The comparable American figures for jury trials, appeals and success rates are higher again, but are still strikingly small. By and large common law litigation approximates much more closely in practice to Damaska's ideal type of coordinate authority than hierarchical authority.

The general theoretical point is that in seeking to understand and evaluate evidentiary norms it is necessary to consider their role, use and impact, actual and potential, on all important decisions in litigation from normative, interpretative, and empirical points of view.

We have already seen this illustrated with reference to identification,¹⁰⁴ confessions, and standards for decision other than standards of proof. One implication of the Cheshire Cat argument is worth spelling out in relation to adjudicative decisions by non-curial tribunals and *all* official decisions in respect of which rectitude of decision in fact-determination is a requirement or aspiration: to the extent that technical or artificial evidentiary norms, such as the hearsay rule, do not apply to them (or apply without full force), to that extent certain general principles, such as the norms of the logic of proof and the principle of humane and fair treatment of all citizens, become the main relevant norms. The intellectual procedures of modified Wigmorean analysis apply – with variations according to context – to an enormously wide range of official and other decisions in litigation and beyond. Both as aspirational norms and intellectual skills they are much more 'transferable' than the technical rules of evidence which gloss them in some contexts.

Thus the 'realism' of the Hard-nosed Practitioner, as illustrated by Waltz's analysis, needs to be balanced by the demographic 'realism' of a total process view of litigation.¹⁰⁵ The point of this example is not to 'trash' all orthodox treatments of the Law of Evidence, still less to suggest that jury trials and appeals are unimportant

just because they are statistically atypical. There are some advantages in treating the jury trial as a paradigm for considering what is involved in argumentation and rectitude of decision in respect of questions of fact, just because the role of fact-determination is more clearly disaggregated from other roles in that context. The object is not so much to switch attention away from one focal point, but to draw attention to the potential for neglect and distortion, if other important points in the process are ignored.

Let us consider a rather more controversial example: the meaning and significance of the presumption of innocence. Cross, in a typically robust fashion, deals with it as follows:

When it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case to be beyond reasonable doubt. This is the fundamental rule of our criminal procedure, and it is expressed in terms of a presumption of innocence so frequently as to render criticism somewhat pointless; but this practice can lead to serious confusion of thought.¹⁰⁶

If one is only concerned with evidence in disputed trials in relation to conviction and acquittal, this view may be correct, although it has not gone unchallenged. But is it the case that the principle that one is presumed innocent until proven guilty is only relevant to this one kind of decision? Does it not provide an actual or potential rationale for rules governing many other decisions – to arrest, to charge, to grant bail – and in other branches of law (e.g. defamation)? Should it not provide, more than it does in practice, one basis for decisions relating to bail and the way in which prisoners on remand are treated? While the more general principle of humane and fair treatment of all participants in legal processes, including those who have pleaded guilty or have been convicted, is to some extent independent of and broader than the presumption of innocence – is not the principle one that should apply to the treatment of all suspects and accused persons at every stage in criminal process, not just in respect of arguments at trial? Of course, it has special importance at the point of determination of guilt or innocence; and it is probably not realistic to expect it to be applied without modification in some problematic contexts, such as the treatment of suspects on remand; but the value is an important one and its implications and applications need to be taken more seriously than they are in a wide range of contexts. The narrow interpretation given to it by Cross and some other writers on evidence does a disservice to an important general principle of our political morality.¹⁰⁷

The future of the Law of Evidence

This essay is not primarily concerned with such questions as: Will the law of evidence survive? Should it? What should be its future? However, the foregoing analysis at least suggests some general indications.

The fact that there exists an established ‘evidence industry’ suggests that courses, treatises, codes and specialists on the Law of Evidence will survive in the common

law world for many years to come. Nevertheless there are two general trends which suggest that in the long run its survival as a separate field of law is uncertain. First, as we have seen, the trend since Bentham's day has been steadily away from mandatory precepts and detailed technicalities in the direction of structured discretion and more flexible norms. Only in respect of Criminal Evidence is there considered to be sufficient technical detail to justify separate books and courses of a traditional kind. This trend in turn opens the way for the reintegration of the different bodies of evidentiary norms (Criminal Evidence, Civil Evidence, Evidence in Tribunals, Evidence in Arbitration, etc.) with procedure; in England this process is quite far advanced as illustrated by the separate treatment of criminal and civil evidence in important legislation and by the tendency of academic books and courses to concentrate on criminal evidence. On the whole the analysis presented here favours this development because of the difficulty of maintaining a clear and sensible distinction between 'evidence' and 'procedure' and, more important, because specifically evidentiary issues need to be considered in context – the multiple contexts of different types of proceedings and different stages in each proceeding.

However, some factors point in the opposite direction. While we clearly have a number of separate Laws of Evidence more or less suited to different kinds of proceedings, on the broad view of evidentiary norms suggested here they are linked together by a common framework of basic concepts and a single model, however theoretically problematic, of what constitute rational arguments about a disputed question of fact. The logic of proof remains relatively constant, as Thayer and Wigmore perceived in different ways, but it is subject to specifically legal intrusions, e.g. standards for decision, exclusionary norms, rules of competency, that vary according to context. For purposes of exposition and education it is clearly economical to consider these general aspects together, before considering the details of the operation of specific evidentiary norms in the enormous variety of contexts that comprise that complex set of social processes known as litigation. This strengthens the case for treating the principle of freedom of proof, the logic of proof and basic evidentiary concepts as an integral part, indeed the general part, of the law of evidence.

The Law of Evidence has been a battleground for many controversies. The most prominent and persistent debates, not surprisingly, largely concern Criminal Evidence. Some battles such as those over competency, the oath, civil hearsay, are largely over, at least in England. Some long-running controversies – about presumptions, logical and legal relevancy, the meaning of 'real evidence' for example – in so far as they are still unsettled can be treated as primarily conceptual and classificatory puzzles that can be accommodated within the general or theoretical part of the Law of Evidence as it is presented here. The continuing 'probabilities debate' is more problematic.¹⁰⁸ For, while it raises fundamental problems in probability theory and logic, it has important practical implications. The 'unreality' of some of these debates is in part attributable to over-concentration on naive examples, such as the rodeo and blue and green bus problems, which do not take account of important

procedural and other contextual factors.¹⁰⁹ But theories of probability are central to evaluation of evidence and to elucidating basic evidentiary concepts such as ‘standards of proof’, probative value and ‘prejudicial effect’; and statistical evidence is of increasing practical importance in many different types of proceeding ranging far beyond the familiar examples of paternity, discrimination and fingerprinting.¹¹⁰ The lawyer of today needs to be a master of elementary statistics. The general aspects of this can be accommodated within the logic of proof; particular applications need to be considered in their specific contexts.

Criminal Evidence remains the most important area of controversy. Here the disagreements are primarily political. The central issues relate to the relationship between, and the priorities to be accorded to, competing values. Utilitarians, following Bentham, tend to express this in terms of balancing the costs and benefits of rectitude of decision, on the one hand, and vexation, expense and delay on the other. One weakness in Bentham’s treatment was that he failed adequately to analyse and elaborate on what is encompassed by ‘vexation’; another is that, even on his own terms, it can be argued that he miscalculated the extent and intensity of such ‘vexations’ as wrongful conviction, just as most modern treatments of litigation tend to underestimate the vexations or pains for most participants of being involved in litigation at all – the mischiefs of misidentification being merely one example. Modern economic analysis has produced much more sophisticated utilitarian assessments of both civil and criminal litigation.¹¹¹ Many, myself included, do not think that even the most sophisticated versions of utilitarianism can adequately take account of some of the most important values that bear on the risks of wrongful conviction, fair procedures, and acceptable treatment of suspects and of other participants in criminal process. One does not necessarily have to embrace a theory of procedural rights in order to maintain that a very high priority indeed should be given to the principles of non-conviction of the innocent and fair and humane treatment of all participants in litigation, including suspects. Rectitude of decision can, and in my view should, be an important value for non-utilitarians as well as utilitarians. Reconciling and balancing values and principles in criminal process is problematic for all of us.

It is not part of the present enterprise to suggest solutions to these problems. That, in my view, can best be done within the framework of a developed theory of criminal process or, more broadly of criminal justice. However, a broad perspective does have implications for the enterprise.

First, while it makes sense to isolate evidentiary issues for some purposes, debating such topics as safeguards for the accused or the presumption of innocence or the right to silence or improperly obtained evidence is unsatisfactory within a narrow ‘evidentiary’ framework. Put simply, this is because the basic values involved transcend any distinction between evidence and procedure and, indeed, have more far-reaching implications. In designing a decent system of criminal justice it just does not make sense to consider ‘disciplining’ the police or the presumption of innocence or interrogation or even the right to silence from a purely evidentiary

perspective. For this purpose, criminal evidence and criminal procedure need to be seen as interrelated parts of a single subject designated in some such terms as 'criminal justice'.¹¹²

In England in recent years two significant steps have been taken in this direction. First, consideration of 'reform' has moved towards a more integrated approach, exemplified by the differences in the frames of reference of the debates surrounding the Eleventh Report of the Criminal Revision Committee in 1972 and, its successor, the Royal Commission on Criminal Procedure and the resulting Police and Criminal Evidence Act 1984. Whatever one's reservations about the outcome, the analysis and the public discussions were better grounded in the later debate by virtue of the broader frame of reference. Secondly, there are signs of a more principled approach to the study of Criminal Evidence, illustrated by the writings of scholars such as Ashworth, Dennis, Stein, and Zuckerman.¹¹³ The search for principle to ground and to organize academic treatments represents a significant advance on the fragmented, incoherent and over-technical approach of an earlier generation. However, the field is still dominated by separate courses and books on 'Evidence' and 'Procedure', which concentrate on the formal rules and treat many of the broader aspects as falling outside their purview. We are some way yet from a coherent normative theory of criminal justice in which the basic values (in respect of detail and design) are carried through in a principled and realistic fashion. The general trend towards discretion needs to be balanced by a more robust affirmation of general principles.

In respect of civil and non-criminal proceedings the historical trend has been steadily in the direction of a much simplified system, or set of sub-systems, in which derogations from the basic principles of rectitude of decision, free proof and minimization of vexation, expense and delay are officially derogated from only exceptionally and for good reason.¹¹⁴ Some unnecessary complications and evidentiary ghosts still survive and there is a worrying vagueness about the status and applicability of the general law of civil evidence in many tribunals. Most of the pressing topics, such as discovery, are recognized as fitting most comfortably in Civil Procedure, a field which is belatedly becoming recognized in England as a fit subject for academic treatment. For most practical purposes the detail of civil evidence can be readily fitted under that rubric.

Earlier I reported Sir Rupert Cross as saying that he was working for the day when his subject was abolished.¹¹⁵ The context was a debate on criminal evidence and I took issue with that admirable man partly for political reasons and partly because of his narrow conception of the subject. However, it is only fair to pay tribute to his massive contributions to the simplification and rationalization of the subject as he conceived it, especially in respect of civil litigation. A more generous interpretation might be as follows: for most purposes, it just does not make sense to treat the Law of Evidence as a subject apart from the different procedural contexts in which it operates; and the important values that should be the foundation of any healthy system of the administration of justice are likely to be better served by firm and explicit adherence to principle than by standing on technical doctrines which are

largely fragmented, archaic and incoherent and which are often not observed in practice.

Conclusion

- 1 Reasoning about disputed questions of fact in adjudication and in other important decisions in litigation is structured, regulated, and guided by doctrines drawn from substantive law, procedure, logic, and the law of evidence. The latter is primarily concerned with four questions: What facts may be presented or considered as evidence? By whom must they be presented? To whom must they be presented? Of what propositions in issue need no evidence be presented? In respect of these questions no sharp distinctions can be drawn between the norms of procedure, evidence, and practical reason.
- 2 The Law of Evidence consists of concepts, principles, standards, balancing tests, directory instructions, and rules and conventions of practice as well as mandatory precepts dealing with classes of evidence.
- 3 The Thayerite view of the Law of Evidence as a series of disparate exceptions to a principle of free proof is essentially correct if 'freedom of proof' is interpreted to refer to natural or commonsense modes of reasoning about questions of fact at trial and that the law constrains these only in a limited way. For example, the law limits the purposes for which certain kinds of evidence may be validly used (e.g. the hearsay rule) and by structuring, limiting, and guiding the exercise of discretion in making decisions of fact.
- 4 The modified Thayerite view, advanced by McNamara, is also generally correct in suggesting that the great bulk of exclusionary rules can best be interpreted as rules which prescribe the exclusion, on grounds of public interest, of certain information from consideration as good reasons for decision. 'Public interest' covers either classes of evidence or types of situation or a balancing of interests in the circumstances of the case.
- 5 From this perspective Bentham's attack on all mandatory precepts was overstated, but is essentially correct in pointing to the importance of the particular circumstances of the case in respect of making correct decisions about weight, public interest and so on.
- 6 The Gruyère cheese view is essentially correct in emphasizing how little of the surviving Law of Evidence consists of mandatory precepts, especially in civil litigation. But this view underestimates the extent to which legal norms, broadly conceived, can structure and guide reasoning in legal processes.
- 7 The Cheshire Cat view emphasizes that a realistic view of the Law of Evidence needs to beware of over-formal or over-precise statements of the law because (a) of the flexibility of so much evidence doctrine and (b) the rules are often waived, breached, or ignored and (c) many adjudicative tribunals are 'guided but not bound' by the rules of evidence. Most decision making by triers of fact is to a large extent discretionary; but the Cheshire Cat view may obscure the extent to which reasoning by, and the discretion of, all adjudicators are structured in a paradigmatic way.
- 8 Traditional treatises on Evidence treat the contested jury trial as the paradigm of all litigation. From the perspective of a total process model of litigation this is misleading in that jury trials are atypical of all trials, and contested trials are atypical of all litigation and adjudicative decisions are only one kind of important decision in the total process.

However, there is an important sense in which adjudicative decisions are paradigmatic: not only do they ‘cast a long shadow’ over the prior proceedings, but they also serve as a general model for rectitude of decision.

- 9 Wigmore’s claim that the logic of proof is anterior to the Law of Evidence also contains an important insight. The basic concepts of the Law of Evidence are also basic concepts of the logic of proof: in particular, materiality, relevance, admissibility, credibility, validity, cogency, and standards for decision. Furthermore, if the Law of Evidence is a series of exceptions to general principles of practical reasoning, it makes sense to clarify and master these principles before considering the exceptions; and, in so far as the Law of Evidence is concerned with structuring, regulating and guiding *reasoning*, logic and epistemology are foundational to the subject. Accordingly, for most purposes, it is sensible to treat the logic of proof and the rules of evidence as two parts of a single subject.

* Parts of this chapter are derived from a paper entitled ‘Evidence and Proof in Anglo-American Litigation’. Earlier versions were originally presented to legal audiences in Trento, Beijing and Warsaw during 1987–8. Attempting to explain the modern common law of evidence to lawyers trained in civilian and socialist legal systems was a great stimulus to developing a coherent overview of the field. In revising this paper for a more varied audience, I have retained the standpoint of a comparative lawyer introducing the basics of the common law approach to evidence to strangers, in the hope that this will illustrate the truism that foreign travel sharpens one’s perceptions of one’s own culture. It also contains pitfalls for the unwary: in Beijing I started by saying that in England we have many jokes about explaining cricket to foreigners, but explaining our law of evidence was even harder, the audience looked completely non-plussed. I later learned that my interpreter had rendered ‘cricket’ not as the game, but as the insect, which plays a significant part in Chinese culture.

Among the many debts I have incurred, I am particularly grateful to Terry Anderson, Ian Dennis, Alex Stein and Adrian Zuckerman for comments on this version, and to Philip McNamara for permission to quote from his article. [There have been a great many developments in the law of evidence and procedure in common law countries since this was written (see Preface and bracketed notes below). However, the central argument about the Thayerite conception of the Law of Evidence, the Rationalist Tradition, and the tendency to exaggerate the importance of the exclusionary rules remains valid. I have referred to some of the most directly relevant developments in the notes (in square brackets see especially, n. 29 below). This chapter should now be read in conjunction with chapter 11 of the second edition of *Analysis* (2005) ‘The principles of proof and the law of evidence’. For other interpretations see Boyle and MacCrimmon (1991), Posner (1999), and Stein (2005).]

- 1 J. B. Thayer (1898).
- 2 Llewellyn (1962); Twining (1973a) 175–84.
- 3 On the choice of an organizing category see below, ch. 7, where the case is made for treating evidence as a species of the broader category of ‘information in litigation’.
- 4 Best (1849), s. 11. For alternative definitions see 1 Wigmore *Treatise* (Tillers rev. 1983), s. 1.

- 5 For figures, see Zander (1988), [2003a]. On theories of litigation see below, ch. 7.
- 6 We need not concern ourselves here with the problem of borderline cases of adjudication, such as arbitration or quasi-judicial proceedings; the point is that a very great deal of the work of the application and enforcement of state law is today allocated to many kinds of tribunals that perform functions and have powers that have traditionally been associated with courts. See, generally, Farmer (1974). [See below n. 17; on 'alternative dispute resolution' see Twining (1993).]
- 7 See above, ch. 5 and below, ch. 7.
- 8 Above, ch. 3.
- 9 Damaska (1986) [cf. Damaska (1997) which deals with broad trends in the Law of Evidence in the United States, with particular reference to advances in science and technology].
- 10 Damaska (1986), 71.
- 11 Damaska (1986), 3–6, 10–12; cf. Damaska (1986), 69.
- 12 Damaska (1986), 224–5.
- 13 Damaska (1986), 69.
- 14 Damaska (1986), Introduction *et passim*.
- 15 E.g. *Cross on Evidence* (6th edn, ed. C. Tapper, 1985), ch. 1; Keane (1989), ch. 1.
- 16 Zander (1988), 403–9. The jury still plays an important role in American civil litigation. On the contrasts between England and the United States in this respect see Atiyah and Summers (1987), ch. 6. [On the Woolf reforms that have moved civil proceedings away from the adversarial model, see below n. 19.]
- 17 For example, the Industrial Tribunals (Rules of Procedure) Regulations 1985 (SI 1985 No. 16) provide: 'Procedure at hearing: ... 8(1) the tribunal shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings; it shall so far as appears to it appropriate seek to avoid formality in its proceedings and it shall not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before the courts of law.' A useful discussion, referring specifically to Australia, but dealing with common law systems is by Enid Campbell, 'Principles of Evidence and Administrative Tribunals', in Campbell and Waller (eds.) (1982), ch. 8. See also *Cross on Evidence* (6th edn, 1985), 12–16, Logie and Watchman (1989). [See further Dennis (2002) 14–15 emphasizing the difficulty of generalizing about evidence in tribunals beyond a broad principle of natural justice: 'It would seem, broadly speaking, that the more "judicial" in character the proceeding, and the closer it approaches the model of a criminal prosecution, the more likely there is to be a fuller range of rules of evidence', citing *Lanford v General Medical Council* [1990] AC 13 (JCPC). Most textbooks on evidence, still wedded to rules, continue to neglect problems of proof in tribunals.]
- 18 The main differences between the civil and criminal rules of evidence are conveniently summarized in Phipson and Elliott (1986), ch. 2. There is a strong argument for treating the rules of evidence in criminal, civil and administrative proceedings independently in order to integrate them more closely with those different kinds of procedural context.

- 19 Jacob (1987a). [This was written before the ‘Woolf reforms’ of civil procedure in England (Woolf (1996)), which mainly came into effect in 1999. These affected almost all aspects of civil proceedings; the most important change was a significant increase in case management by the court. This substantially undercuts Jacob’s first two principles. For a succinct summary of the story and substance of the reforms, see Zander (2003a), ch. 2. See further Zuckerman (2003) and Jacob (2001).]
- 20 Jacob (1987a), 156.
- 21 For example, a historian or scientist testing alternative hypotheses against available evidence may proceed dialectically, but not necessarily adversarially. ‘Dialectics’ refers to modes of reasoning; ‘adversarial’ characterizes the roles of different participants and, according to Damaska, the purposes of the enterprise.
- 22 Bentham (1827), vol. I, 523–4.
- 23 I have borrowed the formulation from Zuckerman (1987a), 68.
- 24 [On the safeguards for the accused under the civilian ‘audit model’ of procedure, see Anderson (1999a).]
- 25 Ch. 3, above.
- 26 Esp. Bentham (1827).
- 27 For an interesting, but no doubt controversial, discussion see Damaska (1986), ch. 6.
- 28 See above, 85–6.
- 29 [In England, there have been substantial changes since 1990 in several of these areas, very largely in directions that Bentham would have approved. On changes to ‘the right to silence’ under ss. 33–8 of the Criminal Justice and Public Order Act 1994, see J. Jackson (2001), Choo and Nash (2003), and Zander (2003a) at 151–62, 441–5. The hearsay rule in civil proceedings was abolished by the Civil Evidence Act 1995; reform of hearsay in criminal proceedings has been slower. The Law Commission, after reviewing hearsay in criminal proceedings, recommended a number of changes, but proposed the retention of a general principle of exclusion of hearsay. (Law Commission, No. 245 (1997). The Criminal Justice Act 2003 (CJA) now governs criminal hearsay, but preserves eight classes of common law hearsay exceptions. For details see Roberts and Zuckerman (2004), ch. 12. On corroboration, see Birch (1995). A modest, and exceptional move to limit judicial discretion by rules relates to evidence of prior sexual history in rape cases (Youth Justice and Criminal Evidence Act 1999, s. 41, see Birch and Leng (2000), Kibble (2004)). Some of the most important changes relate to character evidence (including evidence of prior convictions). The Criminal Justice Act 2003, Part XI, ch. 1 replaces most of the old law and extends the situations under which prosecution evidence of the bad character of the accused may be admissible, subject to the general discretion to exclude. On the old law, the discussions leading up to the enactment of the CJA, and the detailed provisions of the CJA, see Cross and Tapper (2004), ch. 8, Roberts and Zuckerman (2004), ch. 11. In the longer term the most important influence on the English Law of Evidence may well be the Human Rights Act 1998, see Choo and Nash (2003), Sedley (2005). On the theoretical and empirical background, see Lloyd-Bostock (2000a) and Redmayne (2002).]
- 30 Some of these trends, for example the growth of discretion and the decline of the jury, already existed in Thayer’s day and have gone further. Not all of these trends

have represented linear developments: for example, academic interest in evidentiary theory has been spasmodic. See Mengler (1989).

- 31 [See Jackson and Doran (1995).]
- 32 The piecemeal nature of the English colonial inheritance in respect of evidence in many small states is amusingly described by Professor Keith Patchett (1988). Patchett estimates that Tuvalu, with a population of 900 persons, three lawyers and no resident legally qualified judges, inherited twenty-seven English statutes dealing with evidence; to this have been added particular local provisions spread over more than fifty statutes (about a third of all local legislation). [There have been moves in the direction of codification of the law of evidence in several countries of the Commonwealth, but to date the US Federal Rules of Evidence remains the most comprehensive code. Since 1990 in England the tradition of piecemeal legislation has continued. On Australia, see Dennis (1996), Ligertwood (1998), Odgers (2002) on Canada see Sopinka, Lederman, and Bryant (1999), and Sharpe, Swinton and Roach (2002).]
- 33 [See Swift (2000) arguing that this trend has gone too far in the United States. It has gone further in England and Wales. See, generally, Stein (2005).]
- 34 Cross (6th edn, 1985), Preface; cf., on United States, Mengler (1989).
- 35 [Scientific evidence was one of the most important areas of development in the 1990s, in respect of forensic science and technology, battles of experts, and the debates in the United States surrounding *Daubert v Merrell Dow* 113 Sup. Ct 2786 (1993). For England and Wales, see especially, C. Jones (1994), M. Redmayne (2001), Dennis (2002), ch. 20, Roberts and Zuckerman (2004), ch. 7. On *Daubert* and its aftermath see Graham (1998), Haack (2003a), (2004); on scientific evidence generally, Federal Judicial Center (2000), Faigman et al. (2002). On theoretical aspects see Brewer (1998), Damaska (1997), Freeman and Reece (1998), Nelken (1998), Haack (2003), (2004) and Becher-Monas (forthcoming, 2006).]
- 36 E.g. B. Jackson (1988a) and symposium in (1988–89) 2 (1) *International Journal for the Semiotics of Law*.
- 37 See above, ch. 3.
- 38 Pollock (1899).
- 39 Thayer *Treatise*, 314.
- 40 *Ibid.*, 530; cf. 266.
- 41 *Ibid.*, 264–5.
- 42 *Ibid.*, 265.
- 43 *Ibid.*, 266.
- 44 *Ibid.*, 273.
- 45 *Ibid.*, ch. 6 is entitled ‘The Law of Evidence, and Legal Reasoning as applied to the ascertainment of facts’.
- 46 *Ibid.*, 275; cf. 272.
- 47 See above 70–1; see also *Treatise* 336, 558, 576.
- 48 1 Wigmore *Treatise* (Tillers rev., 1983), s. 3.
- 49 McNamara (1986). Although the Law of Evidence has evolved and been amended since 1986 in many common law jurisdictions, McNamara’s scheme still provides a coherent overview of the structure of evidence doctrine that most student texts fail

- to provide. Deviations from this account vary by jurisdiction. [Cf. Swift (2000) on ‘Thayer’s Triumph’.]
- 50 [On corroboration in England see Birch (1995).]
- 51 [On recent changes, see below n. 69.]
- 52 McNamara (1986), 343–4 (quoted with permission of the author).
- 53 Ibid., 359. McNamara implicitly accepts Wigmore’s useful distinction between ‘Rules of Auxiliary Probative Policy’ (concerned with rectitude of decision) and ‘Rules of Extrinsic Policy’ (concerned with giving priority to other values over rectitude of decision or at least balancing these competing values). McNamara argues (at 345) that most of the former rules fall under the inclusionary principle, ‘subject to the qualification that, where in a criminal trial, the judge forms the view that there is a substantial danger that will put particular information to an irrational use (to the exclusion of its proper use) the judge should exclude’. In both categories, balancing tests predominate. Galligan (1988), 255–8, in arguing that the modern law of evidence is even closer to what Bentham advocated than I had suggested in *TEBW*, arrives at a similar conclusion by a different route.
- 54 McNamara (1986), 360, citing *McTaggart v McTaggart* [1949] P. 94. McNamara treats the rule governing ‘without prejudice’ communications as primarily a rule of use (ibid.) and makes a number of other caveats. *Seem* he treats the protection of public informers as independent of the doctrine of public interest immunity.
- 55 Ibid., 363.
- 56 Below, ch. 7.
- 57 [McNamara’s treatment of privilege and confessions may be considered controversial. His analysis may also need modification in respect of those areas of evidence doctrine that fall within the purview of American constitutional interpretation. However, it is suggested, his framework still provides a valuable overview of the structure of the modern Anglo–Australian Law of Evidence, as represented by the Evidence Act 1995. See now Ligertwood, *Australian Evidence* (3rd edn 1998) which claims that by and large the Australian Law of Evidence is a principled, rational system that seeks to maximize rectitude of decision within the context of the adversary trial. On strains between the adversary system and the Rationalist Model in the United States, see Risinger (2004) (concentrating on contested jury trials).]
- 58 Twining (1988c) [(1997e). See further below n. 65.]
- 59 Stefan Landsman (1984) argues that Bentham was a stronger supporter of the adversarial model than I suggest.
- 60 Bentham, however, recognized two privileges (public policy and confessions to priests). For a detailed discussion see *TEBW*, ch. 2 and n. 81, below.
- 61 Wigmore *Science* (1937), 3; his first statement of this view was published as early as 1913 (Wigmore, 1913a).
- 62 *TEBW*; 165. [This structure is followed in the course on ‘Evidence and Proof’ in the London, LLM, except that the two parts are combined in a single course. See further below, ch. 14.]
- 63 Thayer *Treatise*, 264–5.
- 64 Wigmore *Science*, 4.

65 On 'freedom of proof' see Kunert (1966–7); L J. Cohen in *FL* (1983), ch. 1; Twining (1988c) [1997; Stein (2005)]. In contemporary usage at least four different usages of 'free proof' need to be distinguished:

- 1 Free access to information. The obvious example is freedom of the trier of fact from rules excluding evidence or sources of evidence. The phrase is sometimes extended to include free access of parties to information, for example, through discovery procedures;
- 2 free evaluation of evidence: for example, freedom of triers of fact from formal rules of quantum or weight; or freedom of the jury to disregard the warnings or advice of the trial judge about the weight or credibility of particular items of evidence;
- 3 freedom to decide according to criteria of one's choice: for example, freedom from rules or standards governing burdens of proof and persuasion and formal standards for decision (such as standards of proof);
- 4 freedom from hierarchical controls: for example freedom of the triers of fact from appeal or review by a superior authority.

As we have seen, the English law prescribes some important exceptions to (1) and (3); only minimally seeks to regulate (2); and, compared to civilian systems, makes only limited provision for appeal and review in respect of findings of fact and treats such matters as belonging to procedure rather than evidence. Thayer was mainly concerned with (1) and (2).

- 66 On rules of weight, see Wigmore on Moore, above, 70–1. [See now *Analysis* (2005) 226–7.]
- 67 Cohen (1983). However, determination of relevance which is governed by the same criteria, is left to the judge.
- 68 The classic discussion is Thayer *Treatise*, ch. 11. An important article by Dale Nance (1988) challenges this narrow interpretation of the 'Best Evidence Rule' and argues that reports of its demise are greatly exaggerated.
- 69 [There have, however, been significant changes in respect of dealing with child witnesses, especially under the Youth Justice and Criminal Evidence Act 1999. See Roberts and Zuckerman (2004) at 280–6; Birch and Leng (2000).]
- 70 See the excellent discussions by Dennis (1984) and [2002], Jackson (1988b) and Zuckerman (1989), ch. 10. [On the the demise of judicial warnings, see now Roberts and Zuckerman (2004), ch. 10 and Birch (1995).]
- 71 See above, ch. 5.
- 72 The modified Thayerite view of the Law of Evidence is that it consists of a series of disparate exceptions to a general principle of free proof. If this is correct, then it would seem sensible to start by elucidating the basic principle before considering the exceptions and exceptions to exceptions. Remarkably, nearly all treatises and textbooks on evidence do not do this. They tend to take the principle for granted and proceed directly to considering the detailed rules. Wigmore got nearest to taking the idea of freedom of proof seriously when he argued that the Science of Proof is anterior to the Trial Rules of Evidence and in his teaching he practised what he preached. However, perhaps because of the influence of Thayer's artificially sharp distinction between

‘logic’ and ‘law’, Wigmore’s most influential writings – the *Treatise*, the Code, and the textbook – did not treat freedom of proof as a legal principle and so did not elucidate its meaning nor use it as the explicit basis for organizing the subject. This affected the clarity of his exposition rather than its accuracy. The result was that ‘freedom of proof’ did not become a term of art and an opportunity was lost to present the subject as a coherent and essentially simple whole. Weinberg in Galligan (ed.) (1984) treats ‘freedom of proof’ as a category of meaningless reference (136–8). I disagree, but *semble* Weinberg would be satisfied by making Thayer’s inclusionary rule the basic principle. Formally this might be correct, but it would obfuscate the point for which I am arguing. [On ‘freedom of proof’ see above n. 65 and Twining (1997e).]

- 73 Lewis Carroll, *Alice’s Adventures in Wonderland* (1865). In ch. 8 of the story the Queen has ordered that the cat should be beheaded. At that point only the cat’s head was visible. The executioner argued that you could only cut off a head if there was a body to cut it off from; the King argued that anything that had a head could be beheaded. Some arguments about the abolition and reform of the common law of evidence are rather like that.
- 74 Carlen (1976).
- 75 Above, n. 5.
- 76 [‘Bad character evidence is now governed by the Criminal Justice Act 2003 (Roberts and Zuckerman (2004), 503–15). On the controversy surrounding the subject, see Lloyd-Bostock (2000a), Zander (2003a) 413–22.]
- 77 Mansfield and Peay (1987); DPP *Code for Crown Prosecutors* (1986). Potentially inadmissible evidence of prior convictions is presumably discounted in coming to a judgement on whether there is a reasonable prospect of conviction; however, it is doubtful whether in practice such information is always discounted in deciding whether it is in the public interest to prosecute. [See now the Code for Crown Prosecutors (2003) (www.cps.gov.uk).]
- 78 See above n. 17.
- 79 On standards for decision, see below 248–9 and *Analysis* (2005), ch. 8.
- 80 See above, n. 53 and Zuckerman (1989), *passim*; cf. Tapper in the Preface to the sixth edition of *Cross on Evidence* (1985), quoted above, 202. [Roberts and Zuckerman (2004), 30–32; *Analysis* (2005) at 81–7, 289–90.]
- 81 Hart (1961), 133. Bentham was not a ‘rule-sceptic’ in this sense. The object of his attack was mandatory precepts (dealing with classes of evidence or of witnesses) addressed to the will of the trier of fact, but he strongly favoured cautionary ‘instructions’ addressed to the understanding. (See *TEBW*, 66–9.) At the start of *A Treatise on Judicial Evidence* he (or, more likely, his *redacteur*, Dumont) stated explicitly:

Let it not be inferred from these observations, that all forms should be abolished, and no rule admitted, except the discretion of judges. The forms and rules to be avoided are those, which lay a judge under the necessity of giving a judgment contrary to his conviction, and which render procedure the enemy of the law substantive. We shall afterwards see, what are the true safeguards, that should be raised round evidence and judgments. (at 3)

In the English translation of Dumont's *redaction* the word 'rules' is used in a broad sense to encompass both mandatory precepts and 'directory' standards and other norms. In this context, 'discretion' is used in the strong sense of unregulated or unfettered choice; for Bentham favoured weak discretion in the sense of rational choices that are subject to guidance, justification and criticism according to general standards.

Bentham did not deny the 'reality' of the technical rules of evidence of his day. Indeed he claimed that they were pernicious as a patent source of misdecision. It is true that his famous account of the 'double-fountain principle' can be interpreted as a classic forerunner of modern arguments about indeterminacy (1827, bk. VIII, ch. XXII):

Is interest objected as a ground of exclusion to a material witness? Here you are completely at your ease. There stand the cases, in two rows: on one hand, those in which the objection has been allowed – on the other, those in which it has been disallowed . . . Exclude the witness, you bow to the name of Lord Kenyon, and with him pronounce the laws of evidence to be the perfection of wisdom: receive the witness, your bow points to Lord Hardwicke, and with him you confess your disposition to admit lights. (VII *Works*, 308)

However, the double-fountain principle was only one of eighteen devices of the technical system and Bentham explicitly stated: 'In practice, it has not yet stretched (it must be confessed) nor seems likely to stretch to so all-embracing an extent in the regions of Jurisprudence as to cover the whole field' (*ibid.*).

Bentham was highly sceptical of the *value* of binding rules, but he did not deny that some technical rules existed and influenced adjudication. Accordingly Bentham was not a 'rule-sceptic' in Hart's sense and it is misleading to claim, as I did in *TEBW* (at 66), that his anti-nomian thesis 'can be interpreted as a more radical form of rule-scepticism than is attributable to any American Realist'.

82 Twining (1973a) *passim*, esp. 255, Appendix B; Kelman (1987), 214–22, 257–62.

83 See *Cross on Evidence* (6th edn), 45–47, on the uncertainties about the scope and nature of the duty to warn. [See now Cross and Tapper (2004) at 753–6.]

84 Police and Criminal Evidence Act 1984, s. 74(2).

85 *Cross on Evidence* (6th edn), 338–9, discussing *DPP v Boardman* [1975] AC 421; *R v Sang* [1980] AC 402. The interpretation of these cases has been the subject of an extensive literature. [See *Analysis* (2005) ch. 11.]

86 *Cross on Evidence* (6th edn), 363.

87 E.g. public interest immunity, see *Cross on Evidence* (6th edn), 413–26.

88 Police and Criminal Evidence Act 1984, s. 82(3), preserving the common law power. See further *Samuel* [1988] 2 All ER 135; *Alladice* [1988] 87 Cr App Rep 380. [See now Zander (2003b).]

89 Heydon (2nd edn, 1984), 8–9, 331–9. Zuckerman (1989) treats appeals to the 'Res Gestae' doctrine as a discretionary device for admitting evidence that would be inadmissible if the hearsay rule were strictly applied – i.e. a fictitious entity with practical effects. [See now Roberts and Zuckerman (2004), 14–16, 646–53, 659.] On the survival of a 'best evidence principle' see above, n. 68.

90 E.g. Keane (1989), ch. 15; cf. Thayer *Treatise*, 524.

- 91 Galligan (1988), 249, 256–7; cf. Mengler (1989).
- 92 Galligan (1986), 7.
- 93 Galligan (1988); see below, ch. 7.
- 94 This challenges positivists like Thayer (1898), 279n. and J. Stone (1964) whose work on ‘lawyers’ reasonings’ is confined to questions of law.
- 95 See, however, Teitelbaum et al. (1983) [and Lloyd-Bostock (2000a) and studies cited there].
- 96 E.g. Zuckerman (1989).
- 97 [The Woolf reforms of civil procedure have accelerated this tendency, see above n. 19.]
- 98 See further below, chs. 7, 14 and 15.
- 99 A great deal of what is most valued, or most controversial, in respect of the law of evidence centres round the importance and scope of the principle against mistaken conviction and the principle of protection of suspects and others against mistreatment (above, 198). A great deal of criminal evidence doctrine can be subsumed under these two principles; cf. Galligan (1988), at 261:

[T]he presumption of innocence, the burden of proof on the prosecution, the standard of proof beyond reasonable doubt – all reflect the special concern not to convict the innocent. That same concern has implications for other rules: those relating to similar facts, character, corroboration, restrictions of cross-examination of the accused, and confessions (to some extent), make more sense and are more justifiable than they otherwise would be, if they are viewed in the light of the principle against wrongful convictions. Each rule attempts to regulate the reception and use of evidence which, if freely admitted, would create a special risk of an unwarranted conviction. The principle against wrongful conviction explains why such types of evidence, which are normally of probative value and therefore admissible on the more general test of rectitude, are subject to restrictions. For that principle dictates that the aim of a trial be not simply a blanket notion of rectitude: it requires rectitude in the sense of ensuring, at least at a certain level, that convictions are rightly made even at the cost of acquittals wrongly made.
- 100 Above, n. 77.
- 101 Louisell, Kaplan and Waltz (1972), 1287.
- 102 Ibid., 1287–328.
- 103 Zander (1988) [(2003a), ch. 7].
- 104 Above, ch. 5.
- 105 On the Hard-nosed Practitioner see above, ch. 4; on realism see below, ch. 7, 262–5.
- 106 Cross (1985), 6th edn, 114–15. [Cross and Tapper (2004) 146–7. See further Ashworth and Blake (1996), Paciocco (2001).]
- 107 For further examples, see below, ch. 7.
- 108 On the probabilities debate, see above ch. 3 at 74.
- 109 Below ch. 7, at 258–9.
- 110 For example, Lempert (1988), 63 quotes the following extract from a 1986 LEXIS search on the use of statistical evidence in the United States: ‘A search of published opinions in federal courts with a computer-based legal information retrieval system

reveals the dramatic growth since 1960 in cases involving some form of statistical evidence. Between January 1960 and September 1979 the terms 'statistic(s)' or 'statistical' appeared in about 3,000 or 4% of 83,769 reported District Court opinions, In the Courts of Appeals, the same terms appeared in 1,671 reported opinions.' See further, Barnes (1983) [Aitken (1995), Finkelstein and Levin (2001), *Analysis* (2005), Appendix 1].

111 [Economic analysis of evidence doctrine came rather late. See now Posner (1999) and Lempert (2001).]

112 See further below, ch. 7.

113 [Zuckerman (1989), Ashworth (1998), Dennis (2002), Roberts and Zuckerman (2004), Stein (2005) have continued this admirable tendency to emphasize principle. Unfortunately, these have been seriously undermined by responses to 9/11 and 'the war on terror', together with 'law and order' reforms of the Bush and Blair regimes that have eroded basic principles. See further above n. 29.]

114 On different levels of 'official views' and their relationship to practice, see McBarnett (1981).

115 Above, 1.

Rethinking Evidence

Introduction

When I took up Evidence, it was with the express intention of treating it as a case-study of the problems of ‘contextualizing’ any established field of law. The central question was: What might be involved in studying evidence within a broadened conception of law as a discipline? One of the lessons of the history of the American Realist Movement was that those who had tried to develop broad, inter-disciplinary approaches to the study of law, including ‘the law-in-action’, had failed to construct coherent alternatives to the law-as-rules orthodoxy that they sought to replace. The toughness of that orthodoxy was in part due to the fact that it was compact, coherent and manageable. At least, it seemed to be so. Realists, such as Holmes, Cook, Llewellyn, and Frank, opened up a range of potentially fruitful lines of enquiry, but they failed to confront, let alone resolve, the Pandora’s Box problem.¹ Accordingly a major aim of the project was to tackle the problem of coherence as part of a realist or contextual approach by developing a framework for an inter-disciplinary perspective on Evidence, Proof and Fact-finding in Law. A second concern was to clarify what it means to claim to be ‘realistic’ in this context, a question which seemed especially pertinent to an enquiry into the determination and construction of ‘facts’.

I was fortunate both in my choice of subject and in my timing. For most of this century Evidence had the image among English lawyers of being a narrow, highly technical, often frustratingly unreal subject which was mainly the concern of judges and practising barristers. It was generally viewed as a clear example of ‘lawyers’ law’. I soon found that Bentham was much nearer the mark when he wrote: ‘The field of evidence is no other than the field of knowledge.’² I hope that some of the fascination of its many ramifications has been communicated in these essays.

When in the early 1970s I first took up the subject, it seemed to be a rather neglected field.³ There were few signs that we were on the verge of an explosion of interest in a variety of quarters. I knew little of rhetoric or epistemology or probability theory or witness psychology or forensic science and I had only a dim perception of their immediate relevance. There was almost no mention of them in the standard texts on the law of evidence. I had not even conceived of conversation analysis or semiotics or narratology or critical legal studies or fuzzy logic or expert systems.

Mirjan Damaska's first path-breaking contribution was published in 1973; Jonathan Cohen's *The Probable and the Provable* appeared in 1977. David Schum started to contribute to legal periodicals only in 1979. The Wolfson Law-and-Psychology workshops organized by Sally Lloyd-Bostock also began in the late seventies. Peter Tillers's herculean revision of volume 1 of Wigmore's *Treatise* came out in 1983. I first encountered Sir Richard Eggleston in the late 1970s, Terry Anderson in 1981 and Philip Dawid in 1983/4. All of these individuals and many others started their work almost entirely independently of each other. But by the early 1970s we found ourselves to be part of an expanding international and inter-disciplinary network of scholars with converging interests in a field that had lain dormant for most of the twentieth century.

This explosion of new ideas and fresh lines of enquiry produced excitement, bewilderment and frequent temptations to dilettantism. It also sharpened the focus of my project. The claim that one was trying to develop a mapping theory naturally provoked the question: a map of what, for whom, to what ends? The advent of the 'New Evidence Scholarship'⁴ provided a fairly obvious answer. For there was a clear need for a broad framework for charting the relationships between each of these new developments and longer-established lines of enquiry. A mapping theory could supply not only a framework, but might also provide some guidance to specialists from other disciplines about the nature, the extent, and the pitfalls of the unfamiliar terrain on to which they had wandered. Furthermore it might shed fresh light on old questions and identify new or neglected questions worth exploring. Thus providing a general overview of a large and expanding area promised to be a modest contribution to the immodest enterprise of shifting the balance of attention in academic law.

The purpose of this essay is to make explicit the general perspective that has informed the earlier chapters and to examine its potential value and limitations as a contribution to understanding law. This will also serve to draw together the main themes of the book and indicate some possible directions for further exploration.

The basic elements of this perspective have already been introduced and some potential applications indicated. It has been suggested that it is illuminating to view questions about evidence and proof as questions about the processing and uses of information in important decisions in litigation. Information in litigation (hereafter IL) is substituted for 'judicial evidence' or 'evidence, proof and fact-finding' (EPF)⁵ as the basic organizing concept for an area of study that deserves a more central place in the discipline of law than it has occupied until now. The following sections relate this perspective to a particular conception of legal theorizing, elaborate on the basic concepts of IL and consider some of its implications, applications, and limitations.

Theorizing about IL

This book is intended as a contribution to jurisprudence. What is meant by this claim? Jurisprudence can be usefully viewed as the theoretical part of law as a

discipline.⁶ In this sense it is synonymous with ‘legal theory’ but is broader than ‘legal philosophy’. Theorizing and philosophizing can be seen as intellectual activities concerned with certain kinds of questions. A theoretical question can be defined as one posed at a relatively high level of generality. The most general and abstract kinds of questions are conveniently characterized as ‘philosophical’. Somewhat less abstract questions belong to ‘middle order theory’. Theoretical discussion also involves considering more or less particular illustrations, implications, and applications of general ideas and, conversely, the general implications of particular examples.

Three points are worth stressing about this conception of theorizing as an activity concerned with relatively general questions. First, the main counterpoint is between ‘general’ and ‘particular’, not between ‘theoretical’ (or ‘academic’) and ‘practical’. There is no necessary connection or distinction between practical utility and levels of generality.⁷ Secondly, particularity and generality are relative matters, as is illustrated by the metaphor of a ladder of abstraction. There are no sharp boundaries between ‘philosophical’, ‘middle order’, and ‘applied’ questions or theories. Such terms are merely broad indicators of positions on a continuum of generality; they are mainly useful because they are vague. As every lawyer should know, healthy discourse involves a constant interaction between relative generality and relative particularity.⁸ Thirdly, if theorizing is viewed as an activity concerned with posing, re-posing, criticizing, reflecting on, and answering general questions, ‘theories’ should not be assumed to be the only worthwhile outcomes of the enterprise. Of course, the development or construction of well-crafted theories of different kinds is one of the main functions of theorizing. In this context, ‘a theory’ refers to a relatively coherent, argued answer or set of answers to a general question or set of questions. But theorizing is concerned with questioning as well as answering; with digging out assumptions and presuppositions; with exploring logical implications, particular applications, and other connections; with criticizing, as well as constructing, questions and answers and reasons; with charting relations between lines of enquiry; and with developing methods and tools for theorizing, such as techniques of conceptual clarification or the construction of models and ideal types.

Theorizing serves several different functions within the discipline of law.⁹ These ‘jobs of jurisprudence’ include various kinds of intellectual history; ‘high theory’ or legal philosophy *stricto sensu*; middle order theorizing, including developing hypotheses for empirical research or working theories for legislators, judges, and other participants in legal processes and activities. Other jobs include exploring relations and conducting conversations with neighbouring disciplines (‘the lawyer’s extraversion’)¹⁰ and constructing coherent frames of reference for law as a discipline, for legal discourse generally, and for particular sectors, such as theories of contract or criminal law or evidence.

These categories may help to clarify the main purpose of these essays and of this essay in particular. *Theories of Evidence: Bentham and Wigmore* and the first five chapters of this book purport to describe, interpret and evaluate selected aspects of our intellectual heritage in respect of fact-determination in law. Because the primary

concern is with contemporary issues, this is not strictly contextual history in the mode of scholars such as Quentin Skinner,¹¹ but one hopes that it may suggest some fruitful lines of enquiry for historians. In examining and interpreting one sector of our heritage of evidentiary texts I have tried to articulate their basic assumptions and presuppositions in a form that facilitates critical examination and indicates potential points of disagreement or difference from contemporary points of view.¹²

Some central themes of these historical forays and of the later essays bear directly on philosophical questions about reasoning, rationality and knowledge; about the nature of ‘fact’ (and fantasy) and how far some of our inherited concepts in this area stand up to critical scrutiny in the light of ‘sceptical’ challenges of various kinds. There has clearly been a philosophical dimension to these explorations, but they have never been only or even mainly philosophical, both because of the localization of these issues in specific legal contexts and because of the ‘gravitational pull’ of the concerns of different kinds of participants who want, even from theorists, at least general guidance on their activities in the form of strategies for action or working theories of legislation, adjudication, argumentation, and so on. In practice the discipline of law tends to be participant-oriented because its primary clientele consists of actual or intending participants in the world of affairs.¹³ Even those who call themselves ‘legal philosophers’ tend, quite understandably, to operate at a less abstract level than general philosophy. These essays are no exception. One result is that they draw on philosophy far more than they contribute to it.

The jurist John Austin made a useful distinction between ‘particular’ (or national) and ‘general’ (or comparative) jurisprudence: the former is confined to a single legal system, the latter is not.¹⁴ The distinction is, of course, relative since general jurisprudence can be limited to two or more legal systems or to ‘modern’ or ‘Western’ legal systems; or it can make some claim to approximate to universality.¹⁵

In the picture of legal theorizing outlined here the great bulk of both general and particular jurisprudence falls within the sphere of ‘middle order’ theorizing because even quite general questions and concerns relate to specifically legal contexts and hence fall outside the sphere of philosophy *stricto sensu*.¹⁶ One corollary of this is that ‘middle order theory’ covers a rather wide spectrum of levels of generality including, for example, a general theory of legislation such as that of Jeremy Bentham, a general theory of common law adjudication, such as that of Ronald Dworkin,¹⁷ and a theory of American appellate court judging, such as that of Karl Llewellyn.¹⁸ The breadth of the range of middle order theorizing is directly relevant here. The main questions and conclusions in the preceding essays can be interpreted as ranging over many levels of generality. For example, the historical thesis about the Rationalist Tradition is expressly confined to leading secondary Anglo–American writings on evidence over approximately two centuries (1754–1958), for that was the limit of the sample.

However, the claims for the ‘ideal type’ of Rationalist thought are more general, for it is suggested that it is a useful tool for analysing all common law discourse about ‘judicial evidence’ (including, for example, judicial decisions and reform debates)

and, possibly, similar discourses in modern civilian and possibly some non-Western legal traditions.¹⁹

Again ‘modified Wigmorean analysis’ was presented as a useful intellectual tool for trial lawyers and triers of fact at various stages in litigation; with appropriate adjustments, it can also be used by detectives, historians, and intelligence analysts, or indeed anyone concerned with drawing inferences from data.²⁰ It is a highly transferable tool of analysis.²¹ Significantly its transferability is due to its being abstracted to some extent from the complex context of trial practice: it is easier to learn the technique if one postulates a world of free proof, a particular stage in litigation and a stable body of data. For just such reasons, however useful it may be, it can at best be only part of the armoury of a competent practitioner; on its own it does not provide the basis for a rounded working theory for trial lawyers or triers of fact.²²

One further example, which will resurface in this essay, concerns the law of evidence. In chapter 6 Thayer’s interpretation of the Anglo–American law of evidence was examined in the light of major developments since his death and the broadening of perspective involved in adopting a total process model of litigation. The thesis was explicitly restricted to modern English Law, though it seems likely that the main points would apply to most common law systems; ironically, the United States is the most likely deviant because of the survival of the civil jury trial and a rather pugnacious interpretation of adversary procedure.²³ My purpose was to present an overview and interpretation – a way of looking at this branch of law as it stands today – in order to help law students, foreign lawyers and others to make sense of it as a whole. That essay is not intended as a substitute for detailed exposition of what is, in parts, still a complex and technical subject. The main conclusion, that the logic of proof and the rules of evidence should be treated as a single subject, follows Thayer and Wigmore, but goes further in suggesting that these rules regularly bear on all decisions in litigation, not only or mainly in contested jury trials or even contested trials generally.²⁴

Before considering the nature of an IL perspective and some of its potential implications and applications, it may be helpful to take stock by restating the main conclusions that have been suggested so far by these diverse explorations.²⁵ This is done in the next section.

Taking stock

The main conclusions of the preceding essays may be restated as follows.

- 1 The study of fact-determination in legal processes is a large subject which deserves to be given a more central place in the discipline of law than it was accorded in the expository tradition.
- 2 The common law has been unusual in treating ‘Evidence’ as a distinct field of law, the subject of specialized codes, treatises, courses and experts. However, the subject has

been narrowly conceived because (a) the Law of Evidence has often been treated as co-extensive with the subject of Evidence in law; and (b) the Law of Evidence has itself been narrowly conceived as consisting mainly of rules of positive law dealing primarily with questions of admissibility of evidence in contested trials.

- 3 Specialized Anglo–American scholarship and discourse about Evidence have tended to be based on a single, relatively coherent set of assumptions about adjudication and what is involved in rational fact-determination in this context:
 - (a) These assumptions are largely rooted in post-Enlightenment thought, here characterized as optimistic rationalism.
 - (b) Nearly all specialized Anglo–American writers on Evidence from Gilbert (1754) to Cross (1958) have conformed more or less exactly to the ‘ideal type’ of the Rationalist Tradition. Further research may be expected to reveal more deviants in respect of adjudication (Model I) than rational proof (Model II).²⁶
 - (c) The central concepts and distinctions in the Rationalist Tradition – rectitude of decision, materiality, relevance, admissibility, weight/cogency, inference, probability, presumptions, and burdens and standards of proof – have been the subject of highly sophisticated analysis and development, which in respect of evidence may not be matched in any other discipline.
 - (d) The notion of rectitude of decision embodies values that can be expressed in terms of three *concepts* – truth, reason and expletive justice – that are almost universally held to represent the ‘rational core’ of adjudication. However, the particular *conceptions* of truth, justice and reason adopted or assumed by most writers in the tradition are regularly contested in philosophy.
 - (e) Rectitude of decision and accuracy in fact-determination are central values not only of adjudication, but of nearly all official decisions. Adjudicative decisions and the logic of proof may provide a useful paradigm for considering questions about rationality in respect of structured decision making of all kinds.
 - (f) By acknowledging that the law is concerned with probabilities not certainties, ‘open system reasoning’ (induction) rather than ‘closed system reasoning’ (deduction), and the balancing of rectitude of decision against competing social values the Rationalist Tradition created a tough and resilient conceptual framework that accommodated internal disagreements and has powerful defences against at least crude attack from the outside. However, questions arise as to how far the Rationalist model fits comfortably with:
 - (1) adversarial as well as inquisitorial models of procedure;
 - (2) non-utilitarian theories of process values or procedural rights;
 - (3) holistic as opposed to atomistic conceptions of rationality;
 - (4) theories of litigation which depict it as an extremely complex form of social process which neither in respect of design or actual operation can be said to have a single direct end.
- 4 Specialized evidence writing has remained relatively isolated, despite the recognition of the problematic nature in many contexts of sharp distinctions between evidence and procedure, evidence and substantive law, fact and law, fact and value, and fact and opinion. For certain purposes it is justifiable to abstract questions of fact and

evidentiary issues for separate treatment, for example a code or statute on evidence, 'questions of fact' as a means of allocating roles (at first instance or on appeal) or for constructing or analysing arguments or research into the reliability of certain kinds of evidence or sources of evidence. However, sensitivity to the general context and the problematic nature of such distinctions is vital.

- 5 Specialized writing about the law of evidence became artificially segregated from adjacent fields by the end of the nineteenth century. This, combined with a rule-oriented, jury-trial conception of the subject, has certain benefits in respect of sophisticated and detailed treatment of particular topics. However, the costs have included:
 - (a) relative isolation from intellectual developments in adjacent fields;
 - (b) fragmentation of other lines of enquiry bearing on fact-determination, e.g. forensic science, the logic of proof, witness psychology, decision theory;
 - (c) neglect of important topics, for example, matters not covered by formal 'rules' (e.g. evaluation of evidence); the impact and shadow of the Law of Evidence on pre-trial and other decisions; fact-determination post-trial and in tribunals and non-jury trials; standards for non-adjudicative decisions involving fact-determination; and, until recently, neglect of fundamental theoretical questions;
 - (d) distorted perceptions of particular phenomena, e.g. confessions; standards for decision; the consequences of misidentification; the extra-judicial significance of the presumption of innocence; the latent functions of particular institutions, processes and norms (e.g. police interviewing as recruitment; the symbolic aspects of the right to silence).
- 6 The picture presented of our heritage of scholarship and learning about fact-determination, when viewed from a broader perspective, is of a series of related lines of enquiry that have lost touch with each other. In particular:
 - (a) Much of the more varied literature on legal processes neither regularly draws upon nor feeds into the specialized literature on Evidence. Sociologically oriented writings on legal processes and institutions tend to draw on different intellectual traditions and are generally more sceptical in tone. On close examination such scepticisms do not present sustained challenges at a fundamental level to the core concepts of the Rationalist Tradition (see above 3 (d)); they do, however, challenge both the optimism of aspirational rationalism and the particular conceptions that it has espoused.
 - (b) Some researchers in other disciplines, e.g. witness psychology and, to a lesser extent forensic science, have accepted simplistic and outdated models of litigation and fact-determination as the basis for their research.
- 7 (a) The classical Thayerite view of the Law of Evidence is that it consists of a series of disparate exceptions to a general principle of free proof. Subject to a few exceptions and modifications, this view still holds good provided that 'free proof' is interpreted to mean freedom from artificial constraints on free enquiry and natural reason, and that the 'law' of evidence includes not only mandatory precepts but also general principles, flexible standards, balancing tests and guidelines.
 - (b) 'Freedom of proof' implies neither arbitrariness nor strong discretion. Most important official decisions in litigation involving fact-determination are supposed to

- require at least structured discretion. Triers of fact and other official decision makers are subject to an overriding requirement of seeking rectitude of decision. 'Freedom of proof' does not imply freedom from the principles of logic, or principles of political morality, or formal norms of substantive law or procedure.
- (c) If a branch of law consists of a series of exceptions to a single principle it makes sense to study the principle before considering the exceptions.
 - (d) If Thayer was right in treating the Law of Evidence as being primarily concerned with reasoning, and if Wigmore was right in treating the logic of proof as anterior to and more important than the 'Trial Rules', and if the logic of proof and the rules of evidence share the same basic concepts, it makes sense for most purposes of study, exposition and theoretical critique to treat the logic of proof and the rules of evidence as two intimately related parts of the same subject.
- 8 Modified Wigmorean analysis is a useful intellectual procedure for constructing, reconstructing, clarifying, and criticizing arguments about relatively structured questions of fact. It is particularly useful as a device for organizing large 'mixed masses' of data and for subjecting selected phases of an argument to rigorous microscopic analysis. It is less useful in dealing with the evaluation of particular items of evidence or assessment of credibility of witnesses or in contexts where the benefits of meticulous analysis are outweighed by the costs.
 - 9 Stories take many forms and play multiple roles in legal discourse. In the context of argumentation by advocates and judges stories are used for legitimate, dubious and clearly illegitimate purposes, judged by conventional criteria of the ethics of advocacy and of legal argumentation.²⁷ Narrative and analysis are arguably complementary rather than alternative methods of reconstructing and arriving at judgements about past events on the basis of incomplete information.
 - 10 One of the more encouraging developments in doctrinal Evidence scholarship is a renewal of interest in general principles.²⁸ Some of the most important principles underlying a healthy law of evidence (such as the presumption of innocence, the protection of suspects and other participants in criminal process from improper or unfair treatment and the non-conviction of the innocent) should not be conceived solely or even mainly as evidentiary principles, but as part of a more general framework of principles of political morality.

'The New Evidence Scholarship' and the need for a mapping theory

In a preliminary stock-taking of our heritage of specialized evidence scholarship in 1979, I suggested that, despite its many strengths, it was vulnerable to four main lines of attack: it was too narrowly focused; it was atheoretical; it was incoherent; and over-concentration on the rules of evidence has led to 'distortions and misperceptions of key evidentiary issues and phenomena'.²⁹ In 1993 I glossed this general statement in three main respects.

First, while the charges of being atheoretical and incoherent can still be levelled with some justification against a great deal of expository writing in the first seventy-five years of the twentieth century, they do not apply to Bentham or Thayer or

Wigmore or to other less prominent figures, such as Jerome Michael, or to quite a few nineteenth-century writers. The charge against most twentieth-century Evidence scholars is more properly one of neglect of a rich heritage, as is illustrated by the extraordinary disregard of Bentham's *Rationale* and Wigmore's *Science*.³⁰

Secondly, the charge of narrowness also needs qualification. Clearly, neither Bentham nor Wigmore could be accused of being narrowly concerned with legal doctrine. And Thayer with his historical sensitivity and his concern for practical reason hardly fits the prototype of the narrow expositor. However, all three concentrated on *judicial* evidence, and in the case of Thayer, Wigmore and their followers they treated the contested jury trial as the paradigm of the arena in which the law of evidence operates and the law reports as the main repository of their subject. It is symbolically apt that Wigmore should have referred to the Law of Evidence as 'the Trial Rules'.

Thirdly, as was noted earlier, my criticisms of specialized Evidence scholarship were made at an early stage in the recent revival of interest in Evidence. They have to large extent been overtaken by events. What, then, is this 'New Evidence Scholarship'? To what extent is it vulnerable to charges of being narrow, atheoretical, over-concerned with the rules of evidence, or incoherent? The first three charges need not detain us: enough has been said to establish that recent Evidence scholarship has been much concerned with theory, has ranged far beyond legal doctrine, and is informed by an extraordinary range of disciplines. However, we need to look more closely at the nature and extent of these new developments before considering whether they are, or can be made, part of a coherent movement.

In 1986 Professor Richard Lempert, who has himself contributed much to interdisciplinary studies in law in general and Evidence in particular, wrote of 'The New Evidence Scholarship' in the following terms: 'Evidence is being transformed from a field concerned with the articulation of rules to a field concerned with the process of proof. Wigmore's other great work is being rediscovered, and disciplines outside the law, like mathematics, psychology and philosophy are being plumbed for the guidance they can give.'³¹

Lempert suggested that this new and exciting wave of Evidence scholarship was first stimulated by the advent of the Federal Rules and further developed by reactions to the notorious case of *People v Collins*³² which led directly to a series of lively, sometimes fierce, debates about the relationship of theories of proof to Bayesianism and other theories of probabilistic inference.

Lempert's statement appears to reflect a widely held American perception of recent developments. From the other side of the Atlantic 'The New Evidence Scholarship' seems to extend much more widely than that.

Undoubtedly, the literature on the Federal Rules and debates about probabilities are important examples of a widespread revival of academic interest in Evidence. But these represent only two strands in a much more varied picture. In recent years I have attended conferences or seminars exclusively devoted to Facts in Law (Durham, 1982), Probabilities and Inference (Boston, 1986), Semiotics and Legal

Proof (Messina, 1987), *Theoretical Aspects of Evidence and Proof* (Oxford, 1988), and *Freedom of Proof* (Trento, 1988).³³ The excellent series of workshops on Law and Psychology sponsored by Wolfson College, Oxford, since 1979 has devoted a great deal of attention to evidentiary issues. I have been invited, but have not always been able to attend, academic events on Narrative in Culture, Legal Skills, Legal History, Criminal Process, Statistics, Forensic Science, and Expert Systems in Law in all of which issues of inference, proof and fact-determination have featured prominently. The topics covered in the first series of seminars on Evidence in Litigation at the Benjamin N. Cardozo School of Law in New York is similarly wideranging.³⁴ Further evidence of the extent and variety of inter-disciplinary interest in this general area can be found by looking at the publications since 1980 listed in the bibliography at the end of this book.³⁵ In order to interpret these developments, which seem to be related to each other in quite complex ways, it would be useful to have a map. But can all these different academic enterprises be fitted into a single coherent framework?

I would suggest that the main lines of enquiry that have excited interest in this general area can be subsumed under eight broad headings:

- 1 doctrinal analysis;
- 2 procedural scholarship, including Comparative Procedure;
- 3 sociological or socio-legal (including micro-economic) studies of legal institutions and processes;³⁶
- 4 inference;
- 5 studies of discourse, including structuralist, deconstructionist, semiotic, rhetorical, narratological and phenomenological approaches;
- 6 psychological research;³⁷
- 7 scientific and technological developments, including forensic science, computer applications and expert systems;³⁸
- 8 historical enquiries relating to all of the above.

Of course, this list is not comprehensive and it could be presented in different ways. For example, it does not make any specific mention of the philosophical or political dimensions of several of these groups. However, a framework which can accommodate all of these categories should be of some value if it can serve the following purposes: indicate points of connection between seemingly diverse lines of enquiry; subject such enquiries to critical scrutiny as to what questions are and are not being asked and how problems are defined; and provide a broad and realistic context for specialized lines of enquiry.

Before considering how far an IL perspective can serve these ends, it is worth taking a further look at the classics of evidence theory from this point of view. The three leading theorists of judicial evidence in the common law tradition all produced coherent frames of reference for their work. Bentham's theory of evidence was on the negative side an attack on all technicality; on the positive side it was part of a more general thesis about the natural system of procedure on the one hand and ordinary

practical reasoning on the other. It is notable both for its internal consistency and for its clear integration with his grand design for all political and legal institutions and with his general philosophical position, of which the principle of utility and the theory of fictions were the main foundations. Internal coherence was and is one of its great strengths.³⁹ Nevertheless, Bentham's *Rationale* is insufficiently flexible and too rooted in its time to be suitable for present purposes.

Thayer's main concern was to construct a clear vision of the Law of Evidence on the basis of principle. In this he succeeded, at least in respect of admissibility.⁴⁰ While most subsequent treatise writers have accepted Thayer's basic ideas, their presentation of the law has tended to be confusing for two main reasons: first, they have generally not dealt explicitly with the principle of free proof, which provides the basis for a coherent view of the subject as a whole. Rather they have tended to focus on admittedly disparate exceptions without first studying the principle. Secondly, they have made some pragmatic concessions to a felt need to include some topics that Thayer had firmly expelled to 'procedure' or 'substantive law', such as the allocation of functions between judge and jury, cross-examination and some presumptions.⁴¹ Such concessions were often quite sensible in the circumstances, but they have tended to be messy and to underline the artificiality of rigidly segregating evidence and procedure. Thayer's framework was also coherent, but it was confined to the Law of Evidence.

Wigmore took an important step in the direction of broadening the study of evidence by his division of the subject into two parts: the Science of Proof (consisting largely of the logical, psychological, scientific and commonsense dimensions of judicial proof) and what he called the Trial Rules. Like Thayer his underlying conception of the subject was to do with reasoning in adjudication: the 'science', and in particular the logic of proof, was anterior to the rules which could by and large be treated as being exceptional, artificial constraints on free enquiry and natural reason. Wigmore also made some pragmatic inclusions of borderline topics in his *Treatise*, but the underlying conception of the subject was a model attempt to construct a framework which was both coherent and inter-disciplinary.

To what extent could Wigmore's Science, suitably updated, provide a coherent framework for 'The New Evidence Scholarship'? The 'Science of Proof' was explicitly stated to be based on 'logic, psychology and general experience'.⁴² This is broad enough to accommodate at least four of the eight heads of enquiry listed above. Thus Wigmore's conception of 'the logic of proof' as a subject can easily accommodate almost all of the recent literature on evidence and inference, even though he wrote before the development of modern interest in statistics, probabilities and inferential reasoning in the context of adjudication. Many new specific questions and answers have emerged from recent debates, but almost all of them relate directly to the central question of the logic of proof, viz.: What constitute valid, cogent and appropriate forms of reasoning about questions of fact in adjudication? Similarly, Wigmore's conception of forensic psychology was confined to a narrow range of questions about the reliability of various kinds of testimonial evidence. However, his 'Science'

could readily accommodate a broader view of forensic psychology that also gives attention to questions about decision making, communication and interaction in the courtroom. Again, his notion of 'general experience' explicitly included forensic science, expert evidence, general knowledge, and commonsense generalizations; he also devoted considerable attention under this head to technological developments in such areas as fingerprinting, graphology, and lie-detection.⁴³ There have, of course, been many specific developments in science and technology since his day, from genetic fingerprinting to computer databases, but much of the literature is still informed by a perspective which is essentially the same as Wigmore's. The main arena is conceived to be the contested trial and the central concern is the reliability of such evidence presented in court. Wigmore clearly indicated the relationship between his Science and the Trial Rules (one does not need to agree with his analysis)⁴⁴ and he did not overlook the historical dimensions of the various components of his Science, although some of his history was somewhat sketchy. It is hardly surprising that he did not pay much attention to discourse analysis and related enquiries, but it would not be difficult to incorporate various kinds of courtroom discourse within an updated version of his Science. Thus a very high proportion of the main lines of enquiry in the New Evidence Scholarship could be fitted within Wigmore's conceptual framework without much difficulty and in a fashion which very clearly indicates their main points of interconnection. This is a classic example of what I mean by a mapping theory. Given that it was first outlined in 1911, it deserves to be recognized as a remarkable achievement.

The weakest point of Wigmore's Science is that it was based on simplistic assumptions about litigation and legal processes. Wigmore was learned in civil and criminal procedure, but his Science was in this respect narrowly focused and it was not informed by an adequate conception of the complexities of legal processes.⁴⁵ This was its Achilles' heel and is the point of departure for an IL perspective.

Constructing a mapping theory: choice of an organizing concept⁴⁶

My project was originally entitled 'theoretical aspects of evidence and proof in adjudication'. Over time each element in the label has come under critical scrutiny. Opting for a total process model involved switching from one kind of decision to all important decisions in legal process and so substituting 'litigation' for 'adjudication'. This in turn meant finding alternative concepts to 'evidence and proof'. As we have seen, a single 'bit' of information that counts as admissible or inadmissible 'evidence' at the adjudicative stage may perform similar, but not identical, functions in respect of other decisions at other stages in the same process. Similarly a 'confession' may be the start of a process of cooperation with authority, the forerunner to a guilty plea (with or without bargaining) or, after retraction, may be admissible or inadmissible as evidence, or its reception may provide a ground for appeal. Again 'standards of proof' at the adjudicative stage are closely analogous to other 'standards for decision' at other stages; for example, the standards governing decisions to prosecute or

rulings that there is no case to answer or an appellate decision that a verdict is 'unsafe and unsatisfactory' all serve similar functions to those served by the standards of proof, but both the standards and the contexts of their operation are different. They are, however, all linked by the notion of rectitude of decision.⁴⁷

The substitution of 'information in litigation' (IL) for 'judicial evidence' or 'evidence and proof' meets these points. This is not merely a matter of labelling or taxonomy. Indeed, one does not expect that conventional labels will be dropped (I shall continue to refer to the 'law of evidence' for this reason) nor should one expect too much from a mere change of classification. What needs to be considered are the potential gains in illumination and coherence from adopting a perspective which takes a fresh look at a traditional field using three key concepts as the main lenses: litigation, decision, and information.

Litigation: some warnings of complexity

The object of IL is the collection, construction, processing, uses of, and argumentation about information in respect of important decisions in the context of litigation seen as a total process. It is sufficient for our purposes to paint the context in broad and flexible terms. For this purpose it is useful to draw on a theory of litigation which does just this. One example is that of John Griffiths, who has developed a total process model that takes account of modern developments in the sociology and anthropology of law. His concern was to construct a general sociological theory of litigation, external to any particular legal system, for the purpose of conducting 'scientific' empirical research, specifically into divorce proceedings and administrative appeals in Holland.⁴⁸ IL, while more narrowly focused in some respects, is concerned with normative and interpretative as well as empirical questions, in so far as these can be differentiated. But Griffiths's conceptual framework and his broad conception of litigation as a process provides a sophisticated and illuminating starting-point for mapping IL.

After considering some of the conceptual problems of developing such a theory, Griffiths suggests that 'normative claim' provides a more satisfactory baseline for analysis than 'dispute' or 'case':

A general theory of litigation, then, has as its object the social behavior entailed in the handling of normative claims. It will consist of a systematic set of propositions with respect to the quantity, variety and distribution of normative claims (input), the interactive processes which take place with respect to them, and the results of such processes (output).⁴⁹

It is worth making some points about this theory without examining it in detail. First, it is very broad: the process starts at an early point, the making of a claim which may or may not lead to a dispute, and it is not confined to 'state law' or 'official' norms. Griffiths's conception of litigation includes claims made under social norms in, for example, traditional African societies or in 'nonstate' arenas, such as schools or factories or family conclaves. The *focus* of these essays has been mainly on state

law and institutions and on official decisions, but it has not been confined to them. There are significant advantages in setting IL in a broad context, but for my purposes it has been sufficient to adopt a somewhat more restricted concept of 'litigation', as a process which can for most purposes be said to start with a formal complaint and which, if pursued to a 'finish', culminates in the enforcement or non-enforcement of a final determination and order by an adjudicative tribunal.

Secondly, 'litigation' in Griffiths's usage cannot simply be contrasted with other modes of dispute-settlement, such as negotiation, mediation, conciliation, avoidance, elimination, exit, lumping it, diplomacy, and war.⁵⁰ A single example of a litigious process may involve not only 'naming, blaming and claiming',⁵¹ but also bipartisan negotiation and settlement, multi-party mediation, and third-party arbitration or adjudication. This is as true in the most formal legal proceedings in modern societies as in other 'informal' or 'unofficial' processes. Once again a broader perspective helps to indicate similarities and connections.

'Process thinking' is a standard form of legal thought. It comes quite naturally to both practising and academic lawyers to think in terms of flows of decisions and events in time involving a variety of actors, institutions and arenas.⁵² Even quite a simple linear process model of litigation is a potentially powerful tool of contextual thinking. For purposes of a mapping theory it has the following attractions:

- 1 It can accommodate the main typical standpoints of and decisions by participants in legal processes within a single framework.
- 2 It can provide a context in which particular decisions (such as adjudicative decisions) and phenomena (such as confessions) can be located in a broader picture.
- 3 It can be adapted quite easily to fit an information-processing model in which the progress of a 'bit' of information can be tracked along the process in which it may encounter noise, be filtered out, stored, coded, translated, modified, or transformed in 'its' transition from an original perception or other triggering event to its reception by a relevant decision maker. Thus the standard legal model can be harmonized with a standard way of organizing and presenting material from decision theory and information theory.⁵³
- 4 The model can help to map points of connection and potential inputs from a variety of disciplines and specialized enclaves of knowledge.
- 5 It serves as a reminder that 'adjudicative decisions' are not co-extensive with 'legal processes', some of which may not involve adjudicative decisions.

For most purposes a simple linear model may be quite adequate. However, recent anthropological and sociological studies of litigation offer some salutary warnings of complexity. Griffiths illustrates some of the limitations of a single linear model of litigation. Concepts like 'case' and 'dispute' are not satisfactory as units of analysis just because they tend not to be neat units: like a story, a 'case' often does not have a clear beginning or ending; it is often part of a longer complex process like a feud or a political campaign; and it may have many ramifications.⁵⁴ Nor do the components of a 'case' remain static, for as the story develops the issues, the

arenas, the participants, their roles and relationships, and other elements may all change.⁵⁵

Griffiths emphasizes another obvious point that is often overlooked:

The extended case method began by making the begin- and end-points of the conception of a 'case' problematic. '[T]he outcome of most conflicts and disputes' is, as Abel observed, not 'resolution' or 'settlement' but 'other conflicts and disputes, with at most a temporary respite between them' (Abel, 1973, 228) . . . It would be wrong to suppose that the impossibility of understanding litigation processes in terms of isolated 'cases' is restricted to exotic circumstances of African tribes and so forth, where litigation takes place between entire lineages which have long-term relationships with each other encompassing repeated negotiation and litigation and requiring long-term strategies within which any individual case is a mere subsidiary incident . . . As Galanter (1974) has emphasized the same is true in 'modern' settings for many institutional litigants such as insurance companies, legal services organizations, prosecutors and public defenders. But even where individuals are involved, as in the administrative appeals we are currently studying, we have every reason to suppose that litigation will often display the characteristics emphasized by the extended case method: a given 'case' will only be comprehensible as a phase in an extended relationship, comprehending among other things earlier conflicts and other interaction between an individual and a local government body, or between two individuals.⁵⁶

Furthermore the process of litigation is not necessarily unilinear. Consider, for example, the aftermath of a quite commonplace 'messy divorce' in terms of the variety of actors, relationships, transactions and events involved and the complexity of the interactions between them and the timing of all of these.⁵⁷

The messages of complexity from anthropologists relate to allegedly routine disputes in 'simple' societies. Even the most formal accounts of modern legal systems remind us of the variety of types of claims, arenas, proceedings, and procedures that fall within the ambit of litigation.

A further point, touched on in an earlier essay, is worth developing here.⁵⁸ Litigation, as we have seen, is sometimes contrasted with, but often includes, other modes of dispute-settlement. Setting litigation in the context of a total picture of dispute-settlement institutions and processes helps to maintain a balanced demographic picture (e.g. what percentage of civil claims reach the stage of the issue of a writ or other formal move?). It also serves as a reminder that the state does not have a monopoly on dispute-settlement.

There are further complicating factors. We have already seen that a single process may involve several modes of dispute-settlement. This was not just a conceptual point. One reason for shifting the focus from adjudication to litigation was the familiar fact that a large majority of civil actions never reach trial and that in most criminal proceedings at common law, by reason of the guilty plea, the trial stage never happens, yet 'evidentiary' issues are involved. Similarly one need have only the most casual acquaintance with French or Italian courts to realize that what they

mean by 'trial' is typically very different from English, let alone American, trials.⁵⁹ Furthermore such proceedings as inquests or public enquiries into disasters may or may not be usefully classified as involving 'litigation' or even 'disputes', but in all such proceedings questions of fact-determination arise and are often central. In order not to open Pandora's Box too wide, we may wish to make third-party decisions by officials a focus of specialized attention, but many of the concepts, insights and modes of thought central to IL so confined have direct implications for fact-handling or information-processing in analogous or related processes.

It is also worth asking whether litigation is only or primarily concerned with dispute-settlement. The boundaries of 'dispute' have to be stretched and stretched if the term is to include all criminal proceedings (especially where there is a guilty plea) or uncontested defamation actions to vindicate one's reputation, to mention but a few.⁶⁰

A realistic picture of litigation recognizes its complexities in design as well as operation. What implications does this have for the prospects of IL as a coherent and manageable focus of attention? Has Pandora's Box been opened too wide? Even if one follows Griffiths in interpreting litigation very broadly – and it is not difficult to narrow the ambit for particular purposes – there is a single thread that constitutes the core of our concern: the factual element in decision making in this type of context.

Decision

To a historian the most interesting thing about decisions is the fact that everyone is talking about them. No one interested in social ideas can fail to notice how large a part the word 'decision' has, of late, come to play in the vocabulary of moral and political discourse. It meets one on every page. Inevitably one asks, 'Why?' (Judith Shklar⁶¹)

It is hardly surprising that decisions and decision making have been a focal point of jurisprudence and the discipline of law. This is not solely because of the central, indeed exaggerated, place given to adjudicative decisions in Anglo-American legal thought. Legislative, administrative and many other kinds of public and private decisions and choices are also a focus of legal attention from many points of view; normative legal theory is centrally concerned with reasoning towards, justifying and criticizing adjudicative and other official decisions; official discretion in deciding has increasingly become a concern of public lawyers; rather more sporadically other decisions in legal process – such as decisions to prosecute, to plead guilty, sentencing, and parole – have been the subject of specialized enquiry. It is difficult to conceive of law not giving a central place to decision making, but it is also worth noting that some American jurists in their 'revolt against formalism' tended to substitute 'decision' for 'rule' as the central concept of legal theory. This was most clearly exemplified in the 'Law, Science and Policy' approach of Lasswell and McDougal who advanced a view of 'law as a process of decision'. Historically this reflected similar trends in neighbouring disciplines.⁶²

For the purpose of mapping connections between different lines of enquiry, 'decision' is particularly useful just because it is a focal point for so many disciplines: psychology, logic, political science, economic analysis, public choice theory, to say nothing of decision theory itself, have this shared point of contact. We have also seen that perhaps the main difference between judicial fact finding and historical and scientific enquiries is that judges have a duty to decide in ways that have important practical consequences. For them decision is a form of action; scientists and historians mainly conclude.⁶³

Decision making is also a focal point for actors in the real world. The actions of Holmes's Bad Man, notaries, tax advisers, policemen, advocates, witnesses, debt collectors, and claims adjusters to a large degree centre on the decisions of judges and other officials. Their roles and their own choices are largely defined in anticipation of or in response to official decisions. To the extent that this is so, such participants and their choices can conveniently be treated as satellites of official decisions. In short, treating decisions and decision making as a focal point for study is an unremarkable, but extremely convenient, way of maintaining coherence and manageability.

Information

The original reason for substituting 'information' for 'evidence' was to emphasize the point that the same 'bit' of information could play multiple roles in the same process. At each stage it may be constructed, reconstructed, deconstructed, processed, filtered, presented, received, and used in significantly different ways.

Information has some further advantages as an organizing concept. First, as with 'decision', 'information' is a central concept of disciplines and subdisciplines, such as cybernetics, information-processing, and various forms of intelligence gathering. This may suggest concepts, questions and hypotheses that have not yet been applied systematically to information in litigation.

Secondly, because it is somewhat broader than 'fact' and 'evidence', 'information' transcends sharp distinctions between 'fact' on the one hand and 'value', 'law' and 'opinion' on the other. The 'information' contained in Edith Thompson's letters or a social enquiry report is not confined to 'pure' or 'simple' facts, whatever those might be. Similarly in ordinary usage 'information' is neutral between atomism and holism. In some contexts it makes sense to talk of discrete 'items' or 'bits' of information, such as Edith's age or someone's address, but we also talk of 'flows' or 'streams' or 'banks' or 'pools' of information that have not been 'atomized' into 'bits'.⁶⁴ Questions about when and how one can sensibly isolate individuated 'facts' for a particular purpose cannot be avoided, especially where the primary focus is on factual information. But it helps to make the problems of making such differentiations fall within a field rather than define its boundaries.

Thirdly, substituting 'information' for 'evidence' indicates the need to broaden our focus beyond 'proof': standards of proof are only one species of the genus, standards for decision;⁶⁵ 'the logic of proof' is a specialized sector of practical reasoning. IL is concerned with the factual element in all important decisions in

litigation, but only exceptionally are questions of fact sharply distinguished from other questions for determination. When they are so distinguished, then the term 'fact' is often used in subtly different ways from ordinary usage. Thus lawyers use 'fact' differently in respect of defining the jurisdiction of a jury, indicating issues that are subject to appeal or review, and determining the status and value of a decision in the doctrine of precedent.⁶⁶

Finally, the history of the study of the Law of Evidence shows how even expositors of legal doctrine had difficulty in delimiting their chosen field. Gilbert, Stephen, Thayer, Wigmore, and many lesser figures struggled with the problem of segregating evidence doctrine from rules of procedure, pleading, substantive law, and much else besides.⁶⁷ Bentham's sharp distinction between substantive and adjective law had a clear role in his general theory; but his manuscripts contain plenty of examples of indecision about where to draw the line between 'evidence' and 'procedure'.⁶⁸ Comparative lawyers sometimes treat the common law as unique in having developed the Law of Evidence as a distinct field of law, the subject of specialized codes, treatises, courses, and even scholars.⁶⁹ As we have seen, it is not true that modern civilian systems 'have no rules of evidence'; for example, it is arguable that proof is in significant respects less 'free' in Italy than in England.⁷⁰ Rather, so far as legal doctrine is concerned, evidentiary issues are treated for most purposes as part of procedure; and civilians as much as common lawyers have problems with the distinction between procedure and substantive law.

If the perennial problems of rending the seamless web of legal doctrine are especially difficult in respect of evidence, how much more difficult is it to make a neat surgical excision of 'Evidence' as a focus of inter-disciplinary study. Faced with this version of Pandora's Box it is not surprising that one reaction is to retreat back to a narrow formalism or to give up any attempt at coherence. An IL perspective may not solve all the problems of classification for purposes of specialized study, but it does provide a possible basis for a much closer integration of evidentiary, procedural, and processual enquiries.

Some implications and applications

An IL perspective has implications and applications for other disciplines and for inter-disciplinary enquiries. I shall touch on these later. However, my immediate interest is with the internal concerns of the discipline of law. The case has already been made in general terms for recognizing the theoretical interest, the practical importance and the wider ramifications of IL in legal scholarship and legal education. This section develops this in relation to some specific topics.

Legal philosophy⁷¹

Legal philosophy *stricto sensu* is that part of legal theory that is concerned with the most general or abstract questions concerning law. The assumptions of the Rationalist Tradition signal some clear points of contact with general issues of

ontology, epistemology, logic, political morality, and social theory. In chapter 4 some potential connections with scepticism in philosophy were indicated, but it was suggested that few legal 'sceptics' are genuine philosophical sceptics in a strong sense. The recent debates on probabilities and proof and, in particular, Jonathan Cohen's writings on inductive logic in this connection are also contributions to the philosophy of science. At a slightly less abstract level, Mirjan Damaska's *The Faces of Justice and State Authority* explores the relationship between political ideology and systems of procedure at a relatively general level and in ways which have a direct bearing on general theories of litigation.

A central theme of the preceding essays relates to philosophical questions about reason, reasoning and rationality in legal processes: What constitute valid, cogent, and appropriate reasonings about disputed questions of fact in adjudication and other legal contexts? What conceptions of reasoning and rationality have been adopted or assumed by writers in the Rationalist Tradition? How well do these conceptions stand up to critical scrutiny in the light of sceptical challenges or philosophical theories developed in a different intellectual tradition? To what extent is it possible and sensible to maintain at least working distinctions between questions of fact and questions of value or law or opinion in the context of adjudicative and other decisions in litigation? What is the relationship between reasoning about questions of fact, questions of law and other lawyers' reasonings in such contexts? For example, should reasoning about disputed questions of law and of fact in adjudication be viewed as closely analogous species of practical reasoning, governed by the same general principles subject to a few contextual variations? Or are the differences more fundamental? And so on.

These examples by no means exhaust the connections between philosophy and IL. It is noteworthy that the points of contact are in large part with areas of philosophy that have not traditionally been treated as central to jurisprudence in the Anglo-American tradition.⁷² At least until recently, the most sustained connections between jurisprudence and philosophy have related to ethical, political, and conceptual problems and to the nature of reasoning about disputed questions of law in hard cases.

IL is also concerned with practical reasoning, mainly about disputed questions of fact. Its links with probability theory, epistemology, historiography, and the philosophy of science were for a long time relatively neglected by lawyers. Thus the resurgence of interest in this area involves extending the range of questions that may properly be regarded as central to the philosophical sector of jurisprudence. At last there is growing recognition that it really does not make sense to confine the study of 'legal reasoning' to disputed questions of law – another example of the narrowing influence of the expository tradition. Out of this may develop a much broader and richer perspective on questions about the nature of practical reasoning in legal discourse. Justifying, arguing towards and appraising decisions on questions of fact, questions of sentencing, assessment of damages, parole, and many other important decisions in legal processes involve a complex mixture of philosophical issues about

the nature of practical reasoning and of other kinds of questions about the nature of legal processes; these in turn raise interesting and relatively neglected questions about the interrelationship between forms and styles of reasoning and different kinds of practical decisions. For example: To what extent do modes of reasoning accepted to be appropriate to questions of law, questions of fact, and questions of sentencing exhibit the same logical structure? To what extent do contextual factors generate different criteria of relevance and of appropriateness? Similarly the questions raised about the relationship between the assumptions underlying the Rationalist Tradition and other intellectual traditions could be broadened to include more general questions about our conceptions of rationality in law. How do these appear in the light of other intellectual traditions and of recent developments in our own? Are they rooted in some particular historical conceptions or are they, as one commentator has boldly suggested, ‘based on the view of rationality common to western civilization’?⁷³

Middle order theory

The difference between philosophical and middle order theory is a relative matter of levels of generality. Middle order theorizing tends to be more context-specific than philosophy, but can nevertheless encompass parts of general as well as particular jurisprudence. Consider, for example, the continuum of questions about reasoning in general, about practical reasoning, about practical reasoning about questions of fact in adjudication, and these last questions in respect of adjudication by magistrates or industrial tribunals in England and what constitutes the most cogent argument in a particular case. As one moves down such a ladder of abstraction one moves further away from ‘pure’ philosophical issues and becomes involved with increasingly specific institutional contexts.

Most of our heritage of ‘general’ and ‘particular’ jurisprudence falls within this broad band of middle order theorizing in which concern with abstract issues has to be combined with a grasp of contextual factors. Because the study of law has tended to be oriented to the concerns of practice-minded participants, a great deal of our heritage of legal theorizing takes the form of prescriptive working theories for different kinds of participants: witness Bentham’s theory of legislation (which included a design theory of adjective law), the theories of (largely appellate) adjudication of Karl Llewellyn and Ronald Dworkin, and Wigmore’s Science of Proof (which was ostensibly addressed to trial lawyers and, incidentally, to detectives). Interestingly our main theories of litigation (Black, Abel, Galanter, and Griffiths) and of procedure (Damaska) have been empirical or interpretative rather than prescriptive, in so far as such distinctions can be maintained.⁷⁴

IL as it has been outlined is a relatively clear example of middle order theorizing, with prescriptive, interpretative and empirical aspects. Although it has grown specifically out of the common law, especially Anglo–American, tradition, many of its central questions and concepts could apply with more or less adjustment to other Western legal systems and beyond. As such it has potential implications for general

and comparative as well as particular jurisprudence. However, in order to make the discussion more concrete and to avoid some of the dangers of over-generalization, I shall restrict myself here mainly to English examples.

Broad perspectives and particular studies: the problem of the division of labour

It is beyond the scope of this essay to try to spell out the possible ramifications of an IL perspective for all the different lines of enquiry that have been identified as belonging to 'The New Evidence Scholarship'. I have already given numerous examples of particular applications; others are too obvious to need elaboration; yet others will be more readily apparent to, or remain to be worked out by, specialists in particular fields. However, something needs to be said about the relationship between IL and specialization.

In a penetrating critique of my *Theories of Evidence* Professor Dennis Galligan challenges the novelty, the utility, and the manageability of a broad approach to evidence.⁷⁵ He claims that the idea that the study of evidence and proof should go beyond the legal rules to incorporate ideas from the social and forensic sciences is 'now orthodox' and he wonders 'whatever happened to the division of labour'⁷⁶

If the attack is on narrowness in the sense of concentration on the rules of evidence, to the neglect of issues about their application in practice and the broader question of proof, then evidence scholarship, like all areas of legal scholarship, has come to realize the importance of these wider pursuits and the contribution of other disciplines. These changes are reflected in the literature which today is richer than ever before. This is all to the good, but it does not follow, as Twining seems to be suggesting, that one is precluded from entering the arena without first mastering – in addition to the law and practice of evidence – the philosophy of knowledge and logic, moral and political theory, probability theory, psychology, ethnomethodology, and statistics – to name but a few pertinent disciplines. All are of course relevant to evidence, just as they are relevant to any area of social or legal enquiry; but it does not mean that all have to be merged into one. There is still a place for the treatise as well as the study of probability, for the close analysis of exclusionary rules as well as their moral basis, for the psychology and dynamics of the courtroom as well as the organizational structure of the police station. Each may advance and illuminate the other, but it is a mistake to think that broad generalization of an interdisciplinary kind is a substitute for close analysis of a selective kind.⁷⁷

Galligan is perhaps more complacent than I am about the extent to which broad inter-disciplinary approaches have become orthodox in practice, but we both acknowledge the existence of the New Evidence Scholarship as a significant development. One hopes that enough has been said here to refute any suggestion that an IL perspective precludes rather than encourages 'close analysis of a selective kind' or that one has to be a polymath before one can embark on any specialized

investigation. The claim that is being made here for IL is that it not only provides a basis for mapping – and possibly synthesising⁷⁸ – a rich assortment of seemingly diverse lines of enquiry, but also that it can provide a context for posing and re-posing questions and defining problems in illuminating and realistic ways. ‘Narrowness’ is harmful when it distorts perceptions or diverts energies away from significant issues into trivial pursuits or generates unnecessary puzzlements. An IL perspective claims to be an antidote to such ailments.

The imbalances and distortions that tend to result from viewing ‘the problem of identification’ from a narrow evidentiary perspective were indicated in chapter 5. Very similar considerations apply to almost all decisions and events pre-trial. An obvious example is the literature on confessions, the great bulk of which is written from an evidentiary perspective and is largely concerned with questions of admissibility.⁷⁹ Attention has regularly been diverted from what should be a central question for those concerned to understand the role of confessing in criminal process: Who ‘confesses’ what, to whom, in what form, in what circumstances and with what results?

Another example of the dangers of posing an issue too narrowly is the notorious ‘problem of the gatecrasher’ formulated by Jonathan Cohen in relation to the meaning of ‘the preponderance of probabilities’ in the civil standard of proof. This example has generated an extensive literature which is notable for an uneasy sense among commentators that there is something ‘unreal’ or ‘artificial’ about the problem.⁸⁰

Cohen’s example concerns a rodeo attended by 1,000 spectators, 499 of whom have paid and 501 have not.⁸¹ Cohen suggests that no legal system should, or is likely to, give a remedy to the rodeo operator against a randomly selected spectator in this situation, even though, on the basis of the ‘naked statistical evidence’ there is a 0.51 probability that the defendant did not pay. He appeals to lawyers’ intuitions to support his argument that in this kind of situation it is inductive (Baconian) rather than mathematical (Pascalian) reasoning which is appropriate.⁸² Cohen is probably right about lawyers’ intuitions, both in respect to the rodeo problem and, more controversially, in respect of an aversion to relying on naked statistical evidence to determine individual cases. But these ‘intuitions’ are not necessarily to be explained solely, or even mainly, by reference to different modes of reasoning.

To the practising lawyer the rodeo example is unconvincing for several other reasons. It is unlikely that a rodeo operator would take legal proceedings over such a small sum. Since the allegation implies fraud, the standard of proof could well be higher than ‘preponderance of the evidence’. It is unlikely that this would be the only evidence. If the defendant is available, why does he not testify? There should be other witnesses (the ticket attendants, other members of the crowd, etc.) who might well be sources of relevant evidence. There may, indeed, be a real problem about naked statistical evidence. At the very least, Cohen’s example illustrates its vulnerability. For, if the defendant were to testify that he paid, even rather unconvincingly, the weight of the bare statistic would be significantly reduced.⁸³

Furthermore, there are at least three kinds of background policy considerations that might help to explain our intuitive reactions to this case. There is a policy of the law that a plaintiff cannot recover more by way of compensation than the total loss suffered. If the rodeo operator were to sue all members of the crowd, using the same argument in each case, how could this policy be implemented fairly? Again, the law 'encourages' those who have relevant evidence to be forthcoming; some would argue that the rodeo operator should carry the risk of non-production of further evidence and be held not to have discharged his burden of proof. And might not the defendant have some procedural rights in respect of other potential co-defendants? In short, the rodeo example does not really support Cohen's thesis.

A Wigmorean lawyer would go one step further. In order to make sense of one sector of an argument, it needs to be set in the context of the argument about the case as a whole. In order to do this one needs more information than is provided by the rodeo chestnut which, like many academic examples, is artificially abstracted from the context of actual legal proceedings. Who is suing whom for what on what basis? One needs to know the answers to such questions before one can even decide whether the meaning of the civil standard of proof is in issue in this context.⁸⁴

The rodeo problem (and to a lesser extent the similar green and blue bus problem)⁸⁵ does not make sense because it has been presented in a decontextualized way. Here 'lawyers' intuitions' may include a variety of considerations of procedure, policy and practicality that have little or nothing to do with the civil standard of proof. But what these intuitions might be cannot be confidently identified without more information about the context. Thus the example almost certainly does not illustrate the problem that it is meant to illuminate. This is not to say that the question of the meaning of the civil standard of proof at trial is either trivial or uninteresting.

A rather different example of an unsatisfactory body of literature is that dealing with the much-discussed problem of 'illegally or improperly obtained evidence'. The great bulk of it centres on the dilemmas of the judiciary in determining whether or not to use such evidence in given circumstances; the main source of the literature is the law reports and commentaries thereon. Nearly all modern writers explicitly or implicitly recognize that the Law of Evidence is likely to be largely ineffective in disciplining the police and other officials pre-trial and that the judiciary is likely to play only a marginal role in regulating the ways in which evidence is obtained in practice.⁸⁶ Undoubtedly, when such cases do reach the courts they pose difficult choices and raise important and interesting questions of principle. From an IL perspective 'the problem' is not only one of admissibility of evidence or of maintaining the integrity or perceived legitimacy of the judiciary. The central issue for those concerned to design a system for ensuring that official behaviour pre-trial conforms to a general principle of decent and fair treatment of all persons involved in criminal process is: What means of upholding this principle are likely to be effective without unduly hampering officials in carrying out the tasks that society has allocated to them? This involves detailed consideration of the situation in the round

and of the kinds of factors that are likely to influence the relative effectiveness of many different means of control: procedural rules; criminal, civil and disciplinary remedies; training; resources; incentives, and so on.⁸⁷ Similar considerations apply to attempts to understand how information relevant to decisions at each stage of a process is gathered, processed, and used in practice. So viewed, the phenomena and problems are not primarily 'evidentiary'; it is odd to see the principle of decent and fair treatment of suspects and others being treated mainly as an evidentiary principle; it is even odder to see the main dilemmas in design and operation as centering on questions of admissibility.

One of the best recent discussions of illegally and improperly obtained evidence is by Adrian Zuckerman.⁸⁸ He gives an excellent account of the dilemmas facing judges in dealing with the admissibility and use of such evidence. He advances several cogent reasons why an exclusionary rule is unlikely to be effective in disciplining police and other official behaviour pretrial. He makes a convincing case for the proposition that there is a value in subjecting police practices to public judicial scrutiny.⁸⁹ He even goes so far as to say that the reason why the courts find it difficult to confront the 'age-old question' is due to two principal factors: '[F]irst, a failure to come to terms with the nature of the problem, and, second, a reluctance on the part of the courts to look beyond the immediate confines of the law of evidence.'⁹⁰

Zuckerman criticizes the courts for adopting a narrow evidentiary perspective, but he himself poses the issue from the same perspective – as a question of admissibility. His main concern is 'the legitimacy' of the administration of justice,⁹¹ a much broader matter. The outcome is an uneasy tension between his 'broad' solution and his definition of the problem which follows tradition in adopting the kind of narrow evidentiary perspective that he criticizes. In short, I tend to agree with Zuckerman's answer, but not with his question.

It may be objected that the passage appears in a book on criminal evidence, which naturally concentrates on evidentiary issues, and that authors should not be criticized for their choice of subject. A brief answer to this is as follows: the vast bulk of the literature on 'illegally and improperly obtained evidence' adopts a similar perspective and, for this reason, exhibits all the symptoms of a topic that has been located in the wrong context. In this instance, there is a striking consensus in the literature that the judiciary, and the law of evidence in particular, can at best make a marginal contribution to the underlying problem. Yet there is very little systematic literature on that problem.⁹²

Secondly, a broad IL perspective does not preclude highly specialized consideration of narrowly defined issues. In this instance, a chapter on this topic in an Evidence text might treat the following questions as central:

- 1 What, if anything, can an exclusionary rule or a discretion to exclude contribute, in the context of other (non-evidentiary) provisions, to the general objective of regulating official behaviour in obtaining information, potential evidence and evidence pre-trial?

- 2 In what circumstances and to what extent does the use of such evidence at trial run counter to principles or policies concerning the need to maintain the integrity or the perceived legitimacy of judges or other state officials? If there is a general principle of clean hands or non-contamination of the administration of justice, what is the scope, the weight and the rationale of that principle and how does it apply to the specific issue of admissibility?
- 3 How far are existing judicial doctrine and practice in regard to improperly obtained evidence consistent with a broader principle of integrity (or legitimacy or non-contamination) in analogous areas?⁹³ And so on.

The important point about this formulation is that none of these questions can be plausibly answered from a purely evidentiary perspective. IL is primarily concerned with question (1). The second and third sets of questions also raise issues of political morality that range far beyond the Law of Evidence, but in a different direction. Arguments about the specific issue of admissibility and use of such evidence cannot plausibly ignore these broader considerations. This does not mean that they cannot be dealt with in a sharply focused way within an orthodox textbook on judicial evidence. The adoption of a broader perspective does not preclude focusing on narrow questions. However, an IL perspective mandates concern with general questions about methods of obtaining and processing information in litigation.

Inter-disciplinary warnings

The main purpose of constructing a model of IL is to provide a framework for mapping a field within the discipline of law. The phenomena and questions within that field all pertain to litigation as one important form of legal process. The focus is legal but, of course, understanding the phenomena and posing, refining and suggesting answers to the questions is necessarily an inter-disciplinary activity. Specialists in other disciplines interested in, for example, inferential reasoning or information processing or discourse analysis or memory or story-telling will almost certainly choose to *organize* their enquiries within quite different frameworks. The IL perspective nevertheless has potential implications for anyone from another discipline who wishes to study phenomena or questions that fall within the scope of IL. Perhaps the most valuable service that a jurist can offer to extra-disciplinary visitors is to give some guidance about the nature and complexities of this particular context, i.e. litigation.

Inter-disciplinary warnings have been a recurrent theme of these essays: witness psychologists have been criticized for accepting too uncritically an unduly simple and unbalanced picture of litigation when addressing ‘the problem of identification’.⁹⁴ Similar warnings might be offered to forensic scientists, although their close practical involvement with criminal investigation should generally have sensitized them to the varying uses of information at different stages of criminal process. Statisticians and lawyers have been warned of the peculiarity of lawyers’

notions of 'fact' and how over-simple chestnuts, such as the rodeo and blue bus problems, generally take insufficient account of procedural complexities. Narratologists, semioticians and the like should be aware that there are many different contexts and modes of legal discourse (both law talk and talk about law) and that lawyers' stories perform many different functions and are told by a variety of functionaries.⁹⁵ Philosophers should take note that lawyers' reasonings are not confined to questions of law in hard cases. Historians and others may find that such notions as materiality and procedural norms are at least as important in explaining lawyers' handling of evidence as the rules of admissibility. There is already an extensive admonitory literature addressed to expert witnesses. One hopes, too, that these messages of complexity will curb over-enthusiasm on the part of Bayesians and decision theorists.⁹⁶

These admonitions are certainly not intended to frighten off visitors from other disciplines who should be treated, like tourists in an underdeveloped country, as welcome guests rather than trespassers. Like any good nationalist, I am concerned to show off the splendours and subtleties of my home ground to visitors while trying to extract from them as much as possible that suits our local needs. Academic lawyers are, after all, in a relationship of dependency and interdependency with many other disciplines. Moreover, the peculiarities and uniqueness of fact-determination in legal contexts can easily be exaggerated. Just as nearly all of the conditions that give rise to doubts about interpretation of rules in legal contexts also arise in other contexts,⁹⁷ so the main problems, obstacles and puzzles surrounding fact-determination in legal processes are shared with other kinds of enquiry. Ironically, one of the reasons for the relative neglect of fact-determination in legal scholarship and legal education has been that there is relatively little about it that is unique or in special need of demystification: witness, for example, the explicit recognition in the Rationalist Tradition of the role of ordinary cognitive competence. The fallacy that underlies that neglect is the confusion between identifying what is characteristic or unique or peculiar about a phenomenon and trying to understand it.⁹⁸

Realism revisited

This book is one emanation of a project that took the 'realism' of Karl Llewellyn and Jerome Frank as its starting-point. The aim has been to develop a 'contextual' perspective on an area of legal concern within a broadened conception of the discipline of law and to confront some factors – notably the problem of coherence – which, in my view, help to explain why the promise of American Legal Realism (one historical example of 'realism')⁹⁹ was not fulfilled. From time to time in the preceding pages terms like 'realistic', 'unrealistic', 'distortion', 'misperception', 'imbalance' have been used in evaluating general approaches and more specific treatments of particular topics. Without attempting a full-scale interpretation of what is involved in a realistic or anti-formalist approach to law in general, it is appropriate to try

to clarify what is, and is not, being claimed about 'realism' and related terms here and to differentiate these from such standard targets as 'barefoot empiricism', 'naive realism' and 'rule-scepticism'.¹⁰⁰

One of the abiding concerns underlying 'realist' approaches is a sense of 'unrealism' about certain kinds of legal discourses. What is meant by the charge that a particular proposition or treatment is 'unrealistic'? There are plenty of examples of such charges in the preceding pages. For example, the Hard-nosed Practitioner and others regularly point to gaps between 'the law in books' and the 'law in action'; between what is said and what is done; between 'paper rules', interposed norms and actual practices; between 'aspiration' and 'reality'; and less discriminately, between 'theory' and 'practice'. Debates about the reform of the Law of Evidence have been said to be 'high among the unrealities', and I have suggested that orthodox treatments of such phenomena as confessions and identification parades have involved misperception or distortion or have overlooked important latent functions and so, by implication, have not reflected reality.

It is now widely recognized that such charges need to be differentiated: that we need, for example, to distinguish among complaints of triviality, irrelevance to particular concerns, narrowness of vision, over-optimistic idealism or utopianism, official mystification and concealment, and remoteness from actual events and consequences – to mention but a few. In short, charges of 'unrealism' are of different kinds and reflect a variety of standpoints and concerns.

There are, however, two common threads running through such complaints. First, they are all negative expressions of dissatisfaction; on their own they do not usually involve very clear positive claims. What for example is the referent of 'the law in action', or 'what is done' or that elusive term 'reality'? Do not these complaints too readily involve commonsense assumptions that beg some of the central questions of interpretative sociology, such as: What is social reality? How is it constructed? By whom? What are the lessons of experience? What is involved in describing, interpreting and explaining them?

Sociologists of law in discussing 'the gap problem', have elaborated this criticism in two ways.¹⁰¹ First, such 'realist' talk assumes uncritically that a 'gap' between aspiration and reality or 'paper rules' and actual practice is necessarily to be deplored. Are not noble dreams or paper rules or ideal types or simple maps desirable or useful just because they do not perfectly mirror 'reality', whatever that is? Does 'realism' have as its ideal the same one-to-one relationship to the real world as the conception of the perfect map that was exactly the same shape and size as the territory it charted?

A second warning relates to the objects of realist attack. It is dangerous to take too much for granted about such targets as 'the law in books' or 'paper rules'. Doreen McBarnett has neatly shown that a careful reading of the relevant rulebooks suggests that the detailed prescriptions of Scottish and English criminal procedure do not reflect the professed ideals of our criminal justice system – such as the Rule of Law and the presumption of innocence.¹⁰² There is a gap between stated official aspiration and the detailed rules. Similarly, critical legal scholars have directed rather more

attention to showing up the indeterminacy, contradictions or meaninglessness of the law in books without unduly concerning themselves with the law in action.¹⁰³

Clearly a modern 'realist' who ignored such messages could justifiably be criticized as naive. However, it does not follow that the sense of dissatisfaction underlying standard realist concerns is unfounded. When the Hard-nosed Practitioner claims that what is said in 'the books' or 'taught in school' just does not reflect her experience, such expressions of disbelief deserve to be taken seriously even if the complainant is silent or not very articulate about such experience or beliefs. There is no need for a sophisticated general theory or scientific research to sustain some basic complaints: for example, claims that 'jury-thinking' or 'appellate court-itis' or formalism can lead to distorted views of routine trials and confessing and identification parades can be sustained by quite simple facts and figures. This kind of 'demographic realism' falls far short of a sophisticated interpretative account of the phenomena in question. It may have served to strip away only one of 'reality's' many veils, but any account that fails to take account of the scale and distribution of the phenomenon under consideration or which treats the atypical as typical or the unrepresentative as representative is vulnerable to easily sustained charges of 'unrealism'. And any account of a body of legal doctrine that assumes that it affects the behaviour and expectations of only one or two kinds of participant, when that is just not the case, is similarly vulnerable.

In the course of my explorations I have made regular use of three standard devices of 'contextual' or 'realist' thinking: clarification of standpoint; thinking in terms of total pictures; and thinking in terms of total processes.¹⁰⁴ These devices, coupled with the assumption that for most academic and practical purposes in law the study of rules alone is not enough, justify labelling the approach in this book as 'realist' or 'contextual'. But 'realism' is not a distinctive form of legal theory nor, in my view, do these techniques amount to anything like a comprehensive methodology for the study of law.¹⁰⁵ They ought, however, to be part of the basic equipment of any student of law.

Once upon a time, lost in the labyrinth of a mid-western Law School, if my memory serves me right, at a return on one of the remoter staircases I came across an alcove with a sofa and chairs in it. It was called 'Reality Checkpoint'. One is free to interpret this as one will. I like to think of students coming there between classes to touch base with 'the real world'. It is as if on a summer's night a theatre-goer, in the interval of an absorbing drama, steps out into the street for a breath of fresh air. Each brings their own sense of reality to this point and, no doubt, different realities on different days. Maybe realism in law stands to legal theory as Reality Checkpoint stands to the classroom. It does not itself offer a rounded theory of or about law or life, but it furnishes a point of reference against which to check any theory for its plausibility or connection with what happens out there – if, of course, there is anything there. It is quite compatible with the idea that each of us sees the world around us with multiple lenses which construct, constitute or reveal many different realities. It helps to maintain connections in a down-to-earth way with actual events

and practices and people in the world of fact, however varied, complex and elusive that world may be. So perhaps we should end with Calvino's beginning:

If on a winter's night a traveller, outside the town of Malbork, leaning from the steep slope without fear of wind or vertigo, looks down in the gathering shadow in a network of lines that intersect, on the carpet of leaves illuminated by the moon around an empty grave . . . What story awaits there in the end? . . . he asks, anxious to hear the story.¹⁰⁶

- 1 See above, ch. 1 at 5–6. One of the main thrusts of modern critical legal theory is to show up the incoherence (and alleged 'contradictions') of all legal discourse. Some critiques hit their target. I am quite prepared to accept the contingency of my own constructions, but I am less willing to surrender the search for coherent ways of looking at the world as a worthwhile aspiration.
- 2 Bentham, *Introductory View*, ch. 1.
- 3 Cf. Wright and Graham (1977), ch. 1; Lempert (1988), 61.
- 4 Lempert (1988), discussed below, 244–9.
- 5 See below, 248–54.
- 6 The ideas in this section are developed in *LTCL*, chs. 4 and 13.
- 7 Of course, many ideas to be immediately usable have to be both concrete and precise. But general ideas and overviews can be of more practical utility than detailed ones when they serve economy or order or have a wide application; see further MacCormick and Twining (1986).
- 8 The *locus classicus* is J. Stone (1964), 267–74.
- 9 See further Twining (1974) and *LTCL*, chs. 4 and 13.
- 10 J. Stone (1964), 16.
- 11 E.g. Skinner (1969, 1978).
- 12 Above 76.
- 13 Twining (1974). See also chs. 4 and 5 (esp. 130–4, above).
- 14 Austin (1863).
- 15 One of the puzzles of contemporary legal theory is how far Ronald Dworkin's theory of adjudication can plausibly be interpreted as transcending particular (American or Anglo-American) jurisprudence. [cf. Twining (2000a), ch. 2.]
- 16 See n. 6.
- 17 Dworkin (1977).
- 18 Llewellyn (1960). The theories of Dworkin and Llewellyn are mainly prescriptive. An example of empirical middle order theorizing is to be found in the ambitious project on the Comparative Sociology of the Legal Professions coordinated by Richard Abel and Philip Lewis. See Abel and Lewis (eds.) (1988).
- 19 Above, 85–6.
- 20 *Analysis* (1990, 2005) *passim*; Schum (1987).
- 21 On the debate about transferability of skills see N. Gold et al. (1989).
- 22 In *Analysis* (1990), Wigmore's method was first presented in an abstract way and then in ch. 5 was 're-contextualised' into the specific context of an American attorney preparing for trial. [The same strategy is followed in the second edition (*Analysis*, 2005); old ch. 5 is now ch. 12. See also chs. 8–10.]

- 23 On the differences between litigation in England and the United States, see Atiyah and Summers (1987). [On the relationship between the principles of proof and the American law of evidence, see *Analysis* (2005), ch. 11.]
- 24 Above, ch. 6.
- 25 [This summary is based largely on chs. 1–6 above. It also took in points made in old chs. 7–10. Chapter 7 (Lawyers’ Stories) is now ch. 9 and the ideas on narrative and argument have been developed in chs. 10–13. These further explorations and applications are generally in harmony with this summary of basic ideas, which was written in 1989–90.]
- 26 See now Risinger (2004).
- 27 See below, ch. 10.
- 28 [For example, Zuckerman (1989), Ashworth (1998), Dennis (2002) and Roberts and Zuckerman (2004) and, in regard to human rights, Choo and Nash (2003) and J. Jackson (2005).]
- 29 Above, ch. 1 at 3.
- 30 See generally *TEBW*.
- 31 Lempert (1988), 61. The context of this statement was the 1986 Boston symposium which was primarily concerned with ‘The uses and limits of Bayesianism in the Law of Evidence’ (see Tillers and Green (eds.) (1988)). Lempert was responding to a provocative paper by Professor Ronald Allen who had argued that the sense of malaise surrounding modern probability debates was due not so much to intractable disagreements about conceptualizing probability as to a need to reconceptualize civil jury trials (Allen, 1988). In that debate Lempert argued that Allen’s proposals might lead to some radical and undesirable changes in the rules governing civil trials (Lempert (1988), 80ff.); while expressing some sympathy with Allen’s approach, I argued that it was still too infused with jury-thinking, court-itis and atomistic models of reasoning to give an adequate account of the malaise. The ‘unrealism’ of some of the debates about rodeos, blue and green buses and other such chestnuts is largely due to their being divorced from a realistic sense of the context of actual litigation (see below). On this occasion Lempert argued that Allen had gone too far, while I argued that he had not gone far enough. Outside this very specific context I suspect that differences in our views of what constitutes a ‘realistic’ perspective on litigation are not very significant.
- 32 *People v Collins* 68 Cal. 2d 319, 438 P. 2d 33 (1968).
- 33 The first three of these conferences led to published symposia: Twining (ed.) (1983) (*FL*), Tillers and Green (eds.) (1988) and B. Jackson (ed.) (1988–9).
- 34 The full title is the ‘International Seminar on Evidence in Litigation’ of the Jacob Burns Institute of the Benjamin N. Cardozo School of Law, Yeshiva University, New York. The seminar is organized by Professor Peter Tillers. In its first two years the programme included contributions from academic lawyers, statisticians, information scientists, philosophers, practising attorneys and a Federal judge. [The series continued during the 1990s, culminating in a major inter-disciplinary conference on ‘Inference, culture and ordinary thinking’ in New York in 2003. See below ch. 15.]
- 35 [The text refers to the period 1980–94. The current bibliography, which extends to 2005, illustrates the continuing multi-disciplinary trends.]

- 36 The ‘socio’ in ‘socio-legal’ covers all the social sciences, including economics, anthropology, psychology and social history.
- 37 [On developments in law and psychology since 1990, see above p. 188 n.* and p. 96 n. 193.]
- 38 [Perhaps the most important developments relating to evidence in the 1990s concerned forensic science and scientific evidence. See 230 n. 35.]
- 39 On the relationship of Bentham’s *Rationale* to his general ideas see *TEBW*, ch. 2.
- 40 Above, ch. 6.
- 41 On the difficulties of separating ‘evidence’ and ‘procedure’ see above, ch. 6 and below, 254.
- 42 Wigmore *Science* (1913, 1937), subtitle.
- 43 Wigmore was influential in the development of what was then called ‘police science’ (Roalfe (1977), 60–2, 85–7).
- 44 Wigmore *Science*, Appendix I, 923–46.
- 45 Wigmore’s treatment of procedure in his *Treatise* and his other writings on the subject tends to be uninspired, if usually adequate in respect of the rules. He drew hardly at all on the literature on litigation and legal processes that was emerging towards the end of his career. His treatment of evidence in non-jury trials (vol. I., s. 4) sits uneasily within a framework that treats the contested jury trial as both the paradigm and the focal point of the subject.
- 46 One of the first steps in rethinking a field is to examine critically the traditional way in which it has been categorized; see, for example, Atiyah’s substitution of ‘compensation for accidents’ for ‘torts’ or ‘negligence’ (Atiyah, 1970).
- 47 Galligan (1988), 252–4, 263–4. [See now *Analysis* (2005), ch. 8.]
- 48 Griffiths (1983), 146–7, 159–61. [See further Twining (1993a).]
- 49 Griffiths (1983), 169.
- 50 Cover and Fiss (1979).
- 51 Felstiner, Abel and Sarat (1980–1).
- 52 The view of processes as flows of decisions and events was developed by Harold Lasswell and Myres McDougal (e.g. 1967); McDougal and Reisman (1981). One hopes that the adoption of this conception of ‘process’ does not automatically condemn one to being labelled as an adherent of Law, Science and Policy or of the so-called ‘Process School’.
- 53 E.g. Lindsay and Norman (1977), Loftus and Loftus (1976), Willmer (1970). The potential bearing of the information sciences on the processing and uses of information in decisions in litigation can be illustrated by three examples. First, the idea of a single ‘bit’ of information, such as a list of past convictions, which is used or not used at different points in a single process would be susceptible to analysis in terms of an ‘influence diagram’ which charts networks involving mixtures of inference and choice (see, for example, J. Q. Smith (1988), ch. 5). Secondly, intelligence analysts, among others, have in recent years become sensitive to the idea of information feeding off itself to produce double or multiple counting of the same piece of evidence. For example, where weight is given to a cumulation of opinions from three seemingly independent sources which have in fact come to the same conclusion on the basis of information derived from the same single source. Such multiple counting of a single

item of information is known colloquially as ‘a self-licking ice cream cone’ (see further Schum (1994), ch. 8, ‘Redundant Evidence’). Thirdly, Schum (*ibid.*, chs. 3, 5 and 11) explores in detail how the processing of information by different actors can affect its probative or inferential value – for example, a policeman takes notes of what a suspect said in an interview and then writes them up later. I am indebted to David Schum for these points.

54 Griffiths (1983), 151–8.

55 A good example of a case-study in which the parties, the fields of law, the issues and the arenas all change in the course of a single ‘affair’ is the film, *The Sunday Times Case* by Philip Britton and Ian Thompson (1984).

56 Griffiths (1983), 152–3.

57 Sampford (1989), in an important critique of the idea that law can ever be treated as systematic, takes me to task for presenting a unilinear model of decisions, tasks, and roles (at 132–3). I agree that many legal processes are not so simple, but I still believe that flow charts are useful devices for analysing and depicting legal processes.

58 Above, ch. 5.

59 Damaska (1986).

60 Abel (1973), Galanter (1983), Griffiths (1983).

61 Shklar (1964), 3.

62 See above, n. 52.

63 Cf. above, ch. 4, n. 82.

64 See further Twining (1988a) 1542–3.

65 [See further *Analysis* (2005), ch. 8.]

66 J. Jackson (1983), Guest (1987), Zuckerman (1986a). [See below ch. 8.]

67 Above, ch. 3.

68 E.g. MSS on ‘forthcomingness’ of witnesses and evidence (Twining, 1986b).

69 E.g. Duhamel and Smith (1959), ch. 5. Cf. Certoma (1986).

70 For example, in respect of rules of competency, Certoma (1986).

71 This passage is based on my ‘Evidence and Legal Theory’ (1984).

72 Kelsen’s ‘Pure theory’ was for a long time debated in the United Kingdom with little or no reference to his epistemological concerns (see Tur and Twining (1986)). The intellectual climate of Anglo–American jurisprudence has changed significantly in this regard in recent years.

73 Galligan (1988), 264. I disagree with this statement, which fails to distinguish between concepts and conceptions of rationality, see above, ch. 4. The latter are ‘essentially contested’ in the Western intellectual tradition.

74 Conklin (1987), challenging sharp distinctions between empirical and normative approaches.

75 Galligan (1988).

76 *Ibid.*, 250 and 264.

77 *Ibid.*, 251.

78 Wigmore’s *Science* provided a synthesis and a map; this essay purports only to sketch a map.

79 The most devastating critique that I have read of the literature on confessions was written by a student, Stephen Thomas, for my seminar at the University of Virginia

in 1976. He concluded that very little of the legal literature had much to do with confessing and that hardly any of the psychological and theological literature moved beyond speculation. Perhaps the most instructive text is still Dostoyevsky's *Crime and Punishment*.

80 The example introduced in L. J. Cohen (1977) has been widely debated for over a decade. The discussions in Tillers and Green (eds.) (1988) rather clearly illustrate the sense of unreality that characterizes such debates.

81 This passage is adapted from the Appendix of first edition of *Analysis* (1991).

82 L. J. Cohen (1977), esp. chs. 7 and 11 and at 355–6.

83 Kaye (1980).

84 Some of these points have been made by different commentators; see the discussions in Tillers and Green (eds.) (1988).

85 The blue and green bus problem is more easily translated into a realistic context, see *Analysis* (1990), Appendix.

86 E.g. Cross (1985) (6th edn, ed. Tapper), 435; Zuckerman (1989). The best empirical study is still Oaks (1970). The problem has attracted much more attention in the United States because it raises important constitutional issues.

87 See, e.g. L. Lustgarten (1986).

88 Zuckerman (1989), ch. 16. Much of that chapter is based on lectures given in the 'Current Legal Problems' series, Zuckerman (1987a), where it was not constrained by being in a text on Evidence. [See now Roberts and Zuckerman (2004), 26–7, 161–5.]

89 Zuckerman (1989), ch. 16.

90 Zuckerman (1989), 342.

91 Zuckerman (1989), 344–6, 350–2.

92 See, however, L. Lustgarten (1986) and literature cited there.

93 If a primary concern about the propriety of admitting and using tainted evidence is to do with the integrity of state officials or the state itself, interesting questions arise as to what constitute closely analogous situations that can be subsumed under a single principle. For example, which of the following are closely analogous: refusal to supply prisoners with syringes or condoms in order to check the spread of Aids; the licensing of prostitutes, gambling or abortion; taxation of illegal or immoral earnings or profits; charging VAT on pornography, hard drugs, alcohol or tobacco; granting immunities or privileges to members of the security forces or others in given circumstances? These examples were suggested by an interesting conversation with Andrew Choo.

94 Above, ch. 5.

95 Below, ch. 10.

96 Twining (1986c), dissenting from Ward Edwards (1986). Edwards's general approach is developed in Winterfeldt and Edwards (1986).

97 [Twining and Miers (1999), *passim*.]

98 *LTCL*, 63.

99 On the need to distinguish between 'legal realism' as a concept not limited any specific time or legal system and American Legal Realism as an historical phenomenon see Twining (1985b). It is a common fallacy to treat 'realism' as an American exclusive.

100 Twining (1985b).

101 Nelken (1981).

102 McBarnett (1981).

103 Peter Tillers has made the point (private communication) that in view of the fact that probability theorists, fact-sceptics and others concerned with fact-determination are interested in 'decisions in situations of uncertainty', it is surprising how little critical legal scholars, who claim to be interested in indeterminacy, have devoted attention to these issues. See also Tillers (1988a). [See, however, Nicolson (1994) and Siegel (1994).]

104 See further *GJB*, 140–2.

105 *GJB*, 140–2.

106 Calvino (1981), 204.

Legal Reasoning and Argumentation*

Reasoning in adjudication

It is sometimes said that the main aim of legal education is to develop skills of ‘thinking like a lawyer’, including skills of legal reasoning. This phrase is often taken to imply that all lawyers think; that they only think about questions of law in the context of adjudication; that there is a single correct way of thinking about such questions; and that this way of thinking is unique or special to lawyers. An alternative view challenges each of these assumptions: that lawyers’ reasonings extend far beyond binary questions of law in adjudication to a wide variety of legal contexts and operations; that what constitute valid, cogent, and appropriate modes of reasoning in each kind of context, and how far rationality is attainable, is contested; that the relevant skills of reasoning involved are not a lawyers’ monopoly, for in practical life everyone interprets and applies rules, negotiates, and weighs evidence and non-lawyers are regularly involved in many kinds of legal operations and contexts, for example as jurors and lay magistrates. There may be special local considerations that apply in particular legal contexts, such as rules of precedent or evidence or procedure, but the basic criteria of validity and cogency for all of these operations can be subsumed under one or other general theory of practical reasoning. This article proceeds on assumptions that are closer to the second view but, for reasons of space, it focuses mainly on reasoning about questions of law and questions of fact in adjudication.

In this context it is important to distinguish between (a) the psychological processes by which adjudicators in fact reach decisions; (b) recommended procedures and techniques for arriving at decisions; (c) the standards by which such decisions are to be justified or appraised/evaluated; and (d) argumentation, i.e. actual modes of discourse involved in advancing arguments. (a) belongs to the domain of empirical psychology; (b) concerns the art or craft of legal decision making; (c) relates to legal reasoning as a normative enterprise;¹ study of (d) is empirical, interpretive, or critical. This article deals with (c) and (d) and is only tangentially concerned with (a) and (b).

Reasoning in adjudication is a focal point for some perennial problems of legal philosophy, including contested questions about epistemology, rationality,

and scepticism; differing conceptions of law and justice; the relations between law and morality; formalism; the role of judges in a democracy; official discretion; and transparency in decision making.

According to one view, a question of law is easy or straightforward if a justification for a decision about it can be rationally reconstructed in the form of a simple syllogism:

Major Premiss: Whenever X happens, then Y ought to happen (Rule (R))
Minor premiss: X happened (Facts (F))
Conclusion: Therefore Y ought to happen (Judgment of guilt, liability etc.).

This model of legal reasoning has often been dismissed as ‘mechanical’ jurisprudence, because most problems of interpretation arise in relation to doubts about the formulation and precise interpretation of the major premiss (R) and the categorization of the facts in the minor premise (F). However, this is precisely the form in which justifications for decisions in ‘easy’ or ‘clear’ cases can be rationally reconstructed.

What if the major premiss or the minor premiss requires justification? There is quite widespread, but not universal, agreement among jurists that deduction has only a limited role in such second order justification of R (legal propositions) and in inferential reasoning from evidence about disputed issues of fact (F). For example, the standard alibi defence can be reconstructed in the form of two linked syllogisms:

No person can be in two different places at the same moment of time
A was in a different place when this crime was committed
Therefore A was not physically present when this crime was committed.

It is necessary for a person to be physically present to be guilty of this crime (X)
A was not physically present when this crime was committed
Therefore A is not guilty of X.

In so far as deduction plays a limited role in justifying R or F, the reasoning involved does not lead to necessary conclusions (‘open system reasoning’).

A rationalist model of reasoning in adjudication

Orthodox rationalist views about reasoning in adjudication can be reconstructed as a model or ideal type to which the views of many leading jurists approximate. Although there is an intimate relationship between questions of law and questions of fact, we begin by treating each separately.

A rationalist model of reasoning in adjudication²: aim and nature of adjudication

- 1 The direct end of adjudication is rectitude of decision, that is the correct application of valid laws to true material facts (facts in issue).
- 2 The logic of justification of judicial decisions involves an application of general principles of practical reasoning in a specific context.

- 3 A judicial decision is legitimate, if and only if, it is justified by sound arguments that satisfy the moral requirement of formal justice that like cases should be treated alike.
- 4 In clear cases a sound justification satisfies the deductive form: if R, then C; F is a case of R; therefore C.
- 5 Doubts can arise about R (e.g. about its validity, its identity, its scope) or about its application to F, or about whether F has been established to the relevant standard of proof, or a combination of these.
- 6 Doubts about R give rise to questions of law; doubts about F give rise to questions of fact.
- 7 In adjudication both questions of law and questions of fact are typically binary (e.g. liable/not liable; guilty/not guilty).

Questions of law

- 8 Resolution of questions of law in hard cases requires second order justification, which may involve different forms of reasoning, notably deduction, induction, reasoning by analogy, or a combination of these.
- 9 A number of independent material reasons may be advanced in a single argument for or against a decision of a question of interpretation or application of R. These reasons may be of different kinds.
- 10 The validity and cogency of different kinds of material reasons are system-specific, that is they depend on the rules and conventions of a given system in respect of authoritative sources of law and appropriate modes of argumentation.
- 11 Second order justification of R may involve two kinds of reasons: (a) authority reasons which relate to the compatibility or fit of a line of argument with the rules and principles of the system and the authoritative sources recognized by that system (arguments about validity, consistency, and coherence); (b) substantive reasons, which relate to values, goals, or institutional requirements of the system.³

Questions of fact

- 12 Rational determination of the truth of alleged facts (F) in adjudication is typically a matter of probabilities, falling short of absolute certainty.
- 13 Judgements about the probabilities of allegations about particular past events can and should be justified by reasoning from relevant and admissible evidence considered by the decision maker.
- 14 Judgements about probabilities have, generally speaking, to be based on the available stock of knowledge about the common course of events. Whether the appropriate theoretical model for reasoning in this context is mathematical (Pascalian) or inductive (Baconian) is contested.
- 15 Rational determination of F is a matter of ordinary commonsense reasoning, as modified by the rules of evidence and procedure of a given system.

Questions of law

Theorists of reasoning about questions of law can be roughly categorized into *rationalists* and *critics*. A reasonably representative sample of leading rationalists might

include Aulis Aarnio (Finland), Robert Alexy (Germany), Ronald Dworkin (United States/Britain), Torstein Eckhoff (Norway), Neil MacCormick (Scotland), Joseph Raz (Israel/Britain) and Robert Summers (United States). Although they come from different legal traditions and quite varied intellectual backgrounds, rationalists are in broad agreement on most of the first ten points. Most focus mainly on second order justification of adjudicative decisions on questions of law in hard cases, because these are perceived to be the most interesting theoretically. These theorists may differ about which kinds of substantive reasons are valid, about their relative weight or cogency, and whether substantive reasons are an integral part of the law or are extraneous to it. Some jurists in the civil law tradition maintain that all second order justification can be reconstructed in deductive form, but the predominant view among common lawyers is that this kind of justification involves mainly open system reasoning. It is claimed that there is sufficient consensus among jurists to provide a solid theoretical basis for developing workable expert systems and other computer applications to law because 'legal theorists tend to concentrate on inherently contentious issues while ignoring "straightforward" matters'.⁴ However, in so far as such applications need to be grounded in deductive formalizations the predominant view is that 'the hard case will remain beyond the reach of AI [Artificial Intelligence] for the time being'.⁵ This view may well be challenged as AI develops.

Among rationalists there are a variety of views on material reasons in second order justification (11). Some differences are matters of emphasis or detail or conceptual refinements, but others are seen as significant. For example, Ronald Dworkin has advanced three theses that are regularly disputed: (a) that there is a single right answer to almost every question of law even in very hard cases; (b) that principles of political morality underlying a legal system are an integral part of the law, and are not external to it; (c) that principles of political morality are the only valid substantive reasons for justification in adjudication; policy reasons and other arguments external to the law are not valid. These theses are part of a general theory of adjudication that maintains that legal reasoning is essentially a moral enterprise; the duty of judges in a liberal democracy is to uphold the law and vindicate rights on the basis of interpretations that make it 'the best it can be'.⁶

At first glance Dworkin's theory conflicts with standard tenets of legal positivism, especially that (a) a sharp distinction must be drawn between law as it is and law as it ought to be; (b) when the law 'runs out', judges may invoke 'non-legal' reasons, including consequentialist reasons; and (c) in such circumstances judges can, may, and do make law interstitially. However, the differences between Dworkin and other rationalists are narrow. Most rationalists agree that moral arguments play a valid role in legal justifications. If 'one right answer' means the solution justified by the strongest conceivable argument, most would accept that it is meaningful to talk of stronger and weaker arguments and that *ties* are a rarity even in respect of open system reasoning. Furthermore, MacCormick and others would treat only some kinds of consequentialist arguments as valid; conversely, Dworkin subsumes under 'principles' some arguments that others treat as consequentialist. There are only a

few kinds of consequentialist arguments that some rationalists treat as valid, but which Dworkin would exclude from adjudication.

The rationalist model has been subject to several challenges. First, it is narrow. It does not address modes of reasoning in earlier times or in non-Western cultures or in the variety of other legal contexts in which practical reasoning is involved. Interpretation by an upright judge may provide a general model of correct interpretation for other officials and good citizens, but what constitutes valid, cogent and appropriate reasoning in adjudication will not be exactly the same for other interpreters. For example, a factory or a tax inspector may appropriately take into account different considerations and interpret the same law differently from a judge.

Secondly, sceptics may doubt the possibility of rationality in adjudication or challenge the idea that this represents the only possible, or the most appropriate, model of rationality or that a single model is applicable across cultures. Suggestions that judicial opinions are merely *ex post facto* rationalizations have been shown to be based on confusion between the logic of justification and the psychology of decision.⁷ The requirement or expectation that decision makers should justify their decisions publicly may at least serve as an institutional constraint or steadying factor that limits arbitrariness or corruption or pure subjectivity.⁸ Recently, critical and post-modern challengers have argued that rationalist models conceal the fundamental indeterminacy of legal decision making. For example:

In all the Western systems, the discourse that judges, legal authorities, and political theorists use to legitimate the application of state power denies (suppresses, mystifies, distorts, conceals, evades) two key phenomena: (a) the degree to which the settled rules (whether contained in a Code or in common law) structure public and private life so as to empower some groups at the expense of others, and in general function to reproduce the systems of hierarchy that characterize the society in question; (b) the degree to which the system of legal rules contains gaps, conflicts, and ambiguities that get resolved by judges pursuing conscious, half-conscious, and unconscious ideological projects with respect to these issues of hierarchy.⁹

The scope of disagreement between rationalists and their critics is easily exaggerated, for few jurists subscribe to extremes of strong philosophical scepticism or radical indeterminacy on the one hand or of strict rationalism and objectivity on the other.

A third challenge suggests that the distinction between clear and hard cases is problematic. Are cases inherently hard or easy? Or is it that some cases are merely perceived or treated as easy and others as hard? Cannot a creative lawyer construct arguments that raise doubts about what was previously perceived to be settled? Such scepticism receives *prima facie* support from a consideration of the many different kinds of doubt that can arise in relation to the interpretation of both legal and non-legal rules.¹⁰ Even in a seemingly simple situation a single factor can be a starting-point (*topos*) for an argument that raises a doubt about what previously may have been treated as clear or settled or simple; and more than one such condition

may be found in the same situation. It does not follow from such indications of *potential* complexity that in practice every routine or seemingly clear case can easily be treated as hard. There are indeed cases in which a significant development of the law took place because what was previously taken as settled was successfully challenged.¹¹ But these are 'leading cases' just because they were exceptional.

A fourth type of challenge suggests that normative theories of legal reasoning tend to be too abstract and simplistic to catch the complexities and subtleties of actual legal arguments. Judicial opinions that run to many pages are 'reconstructed' in just a few propositions. Furthermore, it is often unclear whether the reconstruction is of *actual* or of *possible* arguments. Is a reconstruction of a formalistic, ambiguous, or opaque judicial opinion, or of a decision not backed by any public justification (such as jury verdicts at common law), a reconstruction of the actual justification presented or of the best justification that might have been advanced or of something else? For example, the discursive style of appellate judges at common law is often contrasted with the more succinct style of French judgments which, it is said, are typically expressed in deductive form. If hard cases require a second order justification that can only exceptionally be deductive, this suggests that French courts typically do not indulge in explicit second order justification.

Questions of fact

The study of evidence and inference has roots in the long history of rhetoric and of probabilities, but interest in reasoning about questions of fact in adjudication has been intermittent. Evidence has received more sustained attention at common law than in the civil law tradition, but there the main focus has been on the Law of Evidence. Notable exceptions include Bentham's *Rationale of Judicial Evidence* and Wigmore's *Principles/Science of Judicial Proof*.¹² Since 1970 'The New Evidence Scholarship' has been the forum for lively debates about the practical uses of statistical evidence in court; the competing claims of different theories of probability (with Bayes' Theorem pre-eminent); the thesis that the paradigm case of probabilistic reasoning in adjudication is in principle inductive (Baconian) rather than mathematical (Pascalian);¹³ and whether 'atomistic' models of rationality can accommodate 'holistic' ideas of narrative coherence on which, according to psychological research, decision making by jurors is predominantly based.¹⁴ Such legal concerns are relevant to the study of evidence and inference in other disciplines.¹⁵

Here, three points deserve emphasis. First, Anglo-American ideas in this area have recently spread to continental Europe,¹⁶ but there has been almost no sustained comparison between conceptions of evidence and inference in law in modern Western and other traditions. Secondly, as with reasoning about questions of law, a high proportion of legal scholarship about evidence and inference in law shares a set of assumptions that approximates to the rationalist model of reasoning in adjudication. Thirdly, these assumptions are similarly open to various sceptical or critical challenges including (a) strong philosophical scepticism about the possibility of knowledge or of rational argument or of objectivity in this context; (b) ideological scepticism about the coherence and tenability of 'liberal legalist' ideas

about adjudication; (c) scepticism about claims that the main end of adjudication is implementation of law and vindication of rights; (d) legal fact-scepticism about the feasibility of designing institutions, procedures and rules that will in practice regularly maximize the probability of achieving rectitude of decision;¹⁷ (e) contextual scepticism about the sense of studying adjudicative decisions outside the broader context of total legal processes and broader social processes. To these might be added further challenges associated with post-modernism, feminism, cultural relativism, and developments in the philosophy of science.¹⁸

Law and fact

At first sight, the distinction between law and fact seems simple. ‘What is the scope of this statutory provision?’ is a question of law; ‘What happened on that particular occasion?’ is a question of fact. However, the line is often difficult to draw, especially in regard to the application of rules and the appropriate categorization of a particular fact situation. ‘Was X dishonest?’ or ‘Is this a case of murder?’ could be interpreted as a question of law or a question of fact or a mixed question of law and fact. How such questions are treated in particular cases varies between systems and among different contexts within the same system for different practical purposes. For example, in English law in jury cases questions of law are for the judge, questions of fact for the jury; decisions on questions of law can have precedent value, but findings of fact do not; questions relating to appeals, mistake in contract, or the obligation to give reasoned justifications turn on the distinction between law and fact, but where exactly the line is drawn varies according to context. Furthermore, legal cultures differ significantly in regard to tendencies to frame the issues in particular disputes as questions of law or fact.¹⁹

Reasoning about issues of law and of fact has stimulated two largely separate bodies of literature, despite the intimate connection and similarities between them. Both are perceived to be species of practical reasoning with structures that are binary (guilty/not guilty, liable/not liable) and dialectical (all reasons tend to support or tend to negate an ultimate proposition or conclusion). The ultimate decision is a normative judgement (e.g. liable/not liable). Many ‘questions of fact’ have normative elements: for example, ‘did X behave reasonably in the circumstances?’ is a question of fact, which involves both evaluative and empirical elements. In most systems, once an issue has been categorized as being one of fact or law, different rules (e.g. the law of evidence, the doctrine of precedent) apply with important practical consequences. The kinds of reasoning that are deemed appropriate differ; for example, no one has seriously suggested that Bayes’ theorem applies to questions of law, but nevertheless it might be interpreted as providing a suggestive metaphor regarding the combination of judgements based on different kinds of reasons within a single argument.²⁰ Where decisions on fact, law, and sanctions are the responsibility of a single tribunal, there may be some freedom to consider what is a good solution to the problem of the case as a whole, an option not generally available where responsibility for decisions is divided between judge and jury.

Argumentation

Theories of legal reasoning are primarily normative theories. ‘Argumentation’ here refers to the actual discourses used in advancing arguments, including reasonings that are explicitly or implicitly embodied in such discourses, non-rational means of persuasion, and the strategy, tactics and styles of argument. Argumentation can be studied from a wide range of empirical, interpretive and critical perspectives, drawn from almost any of the perspectives that apply to social discourse generally, including rhetoric, conversation analysis, semantics and semiotics. There has been little sustained research into actual discursive practices of legal actors and, as with the normative literature, most studies have focused on argumentation in adjudication and advocacy.

Most normative theorists claim that their accounts have a more or less close relation to how judges and advocates actually argue. For example, Ronald Dworkin boldly claims that his theory not only prescribes an ideal but also describes ‘best practice’ in common law courts, but this claim is not backed by evidence.²¹ MacCormick uses actual cases from several jurisdictions as illustrations, but his sample is not representative.²² Some analysis of judicial styles has been based on fairly extensive random samples,²³ but these studies have not been replicated.

Explicit links between normative theories of reasoning and actual discourses have been both diverse and intermittent. In social theory the most important connection has been with Max Weber’s thesis that formal rationalization of law is a concomitant of the rise of capitalism and modernity. Critiques of rationalist theories of adjudication are often part of a more general critique of ‘liberal legalism’ and the Rule of Law.²⁴ Closest to the orthodox juristic literature is the neo-Aristotelian ‘New Rhetoric’ of the Brussels School²⁵ and in Germany, Viehweg,²⁶ whose central concern is to describe the starting-points (*topoi*), argumentation schemes, and material factors that can be deployed to try to convince a specific audience (such as a court) or, more speculatively, a universal audience, to do or decide something. Sharing some intellectual ancestors with the New Rhetoric, but more empirically oriented, the Amsterdam School of Pragma-Dialectics aims to develop a model for the rational analysis and evaluation of legal argumentation as a specific, institutionalized form of argumentation in general²⁷ as part of a general effort to develop a model and code of conduct for rational discussants in a conversation intended to resolve disputes. Applied to law this sits somewhat awkwardly with robust adversarial argument. The self-imposed limitation of analysing what is actually said ensures that the approach is quite concrete, but makes it difficult to catch unspoken conventions.

Conclusion

There is a rich body of normative theories about reasoning in modern Western adjudication, but more work is needed to integrate the literature on reasoning

about questions of law and questions of fact and to extend the focus of attention to other legal operations and other legal traditions. In respect of argumentation, one can agree with two leading theorists that ‘what is needed are reflective hermeneutic studies of the current actuality of reasoning practice in modern legal systems’.²⁸

* This is a revised version of an article published in (2001) 13 *International Encyclopedia of the Social and Behavioral Science* 8670–5. It is reproduced here with the kind permission of Elsevier Science Ltd.

- 1 Wasserstrom (1961).
- 2 This builds on the Rationalist Model of Evidence Scholarship (above ch. 3) and extends it to questions of law.
- 3 Summers (1992).
- 4 Susskind (1987), 27.
- 5 Samuel (1994), 290.
- 6 Dworkin (1977), (1985), (1986); cf. Bell (1983).
- 7 Wasserstrom (1961).
- 8 Llewellyn (1962), Raz (1975).
- 9 Kennedy (1997).
- 10 Twining and Miers (1999), ch. 6.
- 11 Simpson (1995).
- 12 Bentham (1827), Wigmore (1913b/1937).
- 13 L. J. Cohen (1977).
- 14 E.g. Pennington and Hastie (1991).
- 15 Schum (1994/2001); below ch. 15.
- 16 E.g. Wagenaar et al. (1993), Nijboer, Callen and Kwak (eds.) (1993); Malsch and Nijboer (1999), Feteris (1999).
- 17 Frank (1949).
- 18 Above, ch. 4.
- 19 E.g. Geertz (1983), Dezalay and Garth (1996). Cf. the debate between Allen and Pardo (2003) and Kirgis (2004).
- 20 On possible similarities between the *structure* of arguments in reasoning about questions of law and questions of fact, see Twining and Miers, *How To Do Things With Rules* (4th edn, 1999), ch. 10.
- 21 Dworkin (1986).
- 22 MacCormick (1978, 1992).
- 23 Llewellyn (1962), Wetter (1960).
- 24 E.g. Kennedy (1997).
- 25 E.g. Perelman and Olbrechts-Tyteca (1971).
- 26 Viehweg (1993).
- 27 E.g. van Eemeren et al. (1992); Feteris (1999).
- 28 Aarnio and MacCormick (1992).

Stories and Argument*

Once upon a time, the French philosopher, Paul Ricouer, visited the University of Warwick. His legacy was a long-running workshop in the mid-1980s on 'Narrative as an instrument of culture'. The organizers divided academic disciplines into three rough categories: 'Not Obvious', such as economics, the philosophy of science, physics, and geography; 'Obvious', such as literature, history, and theology; and 'In-between', including law, anthropology and sociology.¹

They began with 'Not Obvious' and invited scholars from disciplines in that category to give seminars. Whether or not they had thought about it before, the contributors found story-telling playing various roles in each field. For example, a philosopher of science, Rom Harré, reported how scientific journals rarely give a realistic account of the story of an experiment ('Milly sneezed and knocked over the Bunsen burner', or 'how we coped when the grant ran out'); rather, they often gave a quite fulsome account of the life story of the Principal Researcher, thereby lending authority to the findings.

When they turned to law, they decided to invite Lord Denning, the most famous judge of his day, who was well known both as a raconteur and for vivid evocations of the facts of cases in his judgments. The invitation did not disdain flattery. It read in effect: 'Dear Lord Denning, We believe you to be the greatest legal story-teller of your generation. Will you please come to Warwick to tell us your secret(s).' Lord Denning is reported to have replied along the following lines: 'Dear Warwick, I am indeed the greatest story teller of my generation, perhaps of the twentieth century, but I am too old to travel to Warwick. Yours sincerely, Denning.'

There were two sequels to this rebuff. First, despairing of finding a single substitute for Lord Denning, the organizers invited two academic lawyers – Professor Bernard Jackson, who had written about legal semiotics;² and myself, a former member of staff at Warwick, and known for a dilettante interest in literature. I accepted, but also suggested that if Lord Denning could not come to Warwick, Warwick might go to Lord Denning.

Until then I had never thought in a sustained way about narrative in relation to law. My previous engagement with law and literature had been mainly in relation to standpoint and points of view, about which I was influenced by Percy Lubbock and E. M. Forster.³ As soon as I focused on narrative, stories and themes popped up

from many different contexts: barristers' 'war stories' about their cases, lawyer jokes, accounts of *causes célèbres* and miscarriages of justice, Brian Simpson's wonderful contextual studies of leading cases,⁴ lawyer novels, Lord Denning's famous after dinner stories and so on. I remembered that John Henry Wigmore had assembled at Northwestern Law School an extensive collection of third-rate literature on crime, detection, and legal romance. But apart from such frivolities, stories also figure prominently in legal practice. What are the law reports but a vast anthology of short stories about disputes of every kind? And in the law reports, one may find several kinds of story in a single judgment: the facts of the case (sometimes retold two or three times), the story of the proceedings leading up to the decision (but rarely the end of the story as far as the parties were concerned); and the story of the law, tracing the development of the applicable doctrine through a series of precedents, often stretching back a century or more (Lord Denning was a master of this technique).

I am interested in evidence and proof; in that context, story-telling is often contrasted with rational argument and logical analysis, and 'atomism' is contrasted with 'holism'. Psychologists tell us that juries decide more by weighing the plausibility of competing stories than by careful analysis of the evidence. Manuals of advocacy stress the importance of constructing and presenting vivid, coherent, persuasive stories. Even in appellate cases, a standard mantra is: 'The statement of the facts is the heart of the argument.' This brings us back to Lord Denning, because he was most famous for memorable statements – or constructions – of 'the facts' in many of his judgments.

As it happened, Lord Denning did come to Warwickshire (Coventry in fact) and Warwick did go to Lord Denning. Both events are part of my story. First, while I was still at Warwick, I was invited to attend a dinner celebrating an important anniversary of the Warwickshire Law Society. I usually shy away from such occasions, but two of the most famous after-dinner speakers (a peculiarly English art-form) had agreed to grace this one: Lord Denning and Lord Goodman, who was at that time Prime Minister Harold Wilson's solicitor and trouble-shooter. So I went. While we were waiting for things to warm up, I started a book at our table on the length of the speeches. Lord Denning was known to be expansive, Lord Goodman witty and succinct. So I placed my stake on two extremes: three minutes for Lord Goodman; forty-five for Lord Denning. My companions were more cautious.

After some initial lubrication, the dinner began with a procession of dignitaries – white ties and tails, medals, badges of office, mayoral chains, a banner, and a mace. Lord Denning was prominent towards the rear of the procession, but there was no sign of Lord Goodman ('late again'). After the loyal toast, port circulated, and we sat back for the speeches. Lord Denning had compiled a large collection of after-dinner stories and jokes organized on small, numbered card index cards. These were well known in London, but they were apparently new to Warwickshire. He started with a batch of three – let us say Nos. 47, 82 and 135. He immediately captured his audience. So he continued with four more. The audience became merrier. And so he continued.

After about an hour, a large man in a rumpled suit, quite unnecessarily carrying a bulging briefcase bedecked with multi-coloured labels, bustled into the room and sat down at the top table. Goodman had arrived. Unfazed, Denning continued. The audience loved it. At our table the consensus was that this would be a hard act to follow, not least because it was already well past 11 p.m. Eventually, and seemingly reluctantly, Lord Denning sat down to rapturous applause. Goodman looked over his glasses, and began – no notes, no cards, a glass of Scotch in his large right hand:

I have always been a great admirer of Lord Denning – the greatest judge of his generation – nay of the century – nay, perhaps of all time. I have admired him for many things: his short sentences – his disregard for precedent – his courage – his willingness to innovate – his commitment to ‘the little man’[sic]. But I have admired him, above all, for one thing – his memory – especially his memory for stories – and especially his memory for *very old* stories.

He sat down. Stories are not the only vehicles of humour. Less than two minutes. I had backed both winners and I collected £3.25.

On my suggestion, in July 1987 Warwick drove down to interview Lord Denning at his home in the village of Whitchurch in Hampshire. There were four of us: a scholar of comparative literature, a philosopher, a colleague in law, and myself. We were received graciously, like visiting schoolboys, but we had some difficulty in getting the judge to take our mission seriously – that is a different story for another occasion. We had sent him a list of four or five cases that we wished to discuss (including *High Trees*, *Lloyds Bank v Bundy*, *Candler v Crane Christmas*, and *Miller v Jackson* – all well known to English law students).⁵ We asked him about his audiences, his use of rhetorical devices, his prose style, narrative structure, and so on. After a while, he realized that we were serious and that our questions were quite interesting. But his answers were disappointing and not always consistent. He was a Monsieur Jourdain of narrative – he had told stories all his life, but he had never reflected on this.

The first cases had Lord Denning in the role of hero and the discussion went smoothly, if frustratingly for our team. But when we came to *Miller v Jackson*, a notorious case, for which he has been much criticized, the mood changed. This is the well-known case in which recent arrivals to the village of Lintz in County Durham sought an injunction against the local cricket club who, despite their best efforts, had failed to find a way of preventing cricket balls landing in and on the plaintiff’s property. Lord Denning’s opening paragraph begins:

In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch.

In the next chapter I criticize this paragraph in detail, so I will not repeat it here.⁶ In our interview, it was my task to raise the issue. ‘Some of my students are not persuaded; they think that you are overstating the case,’ I suggested. ‘Oh dear,’ he seemed to say, ‘That must have been poor advocacy on my part.’ We gently pressed

him on the relationship between judging and advocacy, but did not get very far. He was tiring and not interested in theory. So I pulled my punches and we parted amicably.

Since these early encounters, my interest in law, literature, and narrative has continued. It has centred on three main themes: First, the idea that stories are often necessary, but dangerous; secondly, the relationship between imagination, reason, and post-modernism in relation to law; thirdly, on the relationship between biblical parables, legal precedents, and the role of stories in reasoning and argumentation.

Having been seduced by the Warwick workshop into thinking about narrative in law, I might also have been seduced into taking a romantic view of narrative and of the relationship between law and literature. But very soon, instead of assuming that stories are necessarily a humanizing influence on law, softening the alleged masculinity of legal logic, I began to stress their splendid potential for 'cheating', especially in relation to fact-finding. They are clearly dangerous, and lawyers and law students should be aware of the common dangers.⁷ In teaching about stories my central theme is that they are necessary but dangerous in the context of arguments about questions of fact and questions of law. They seem to perform an indispensable psychological role, as the American jury research convincingly shows,⁸ but they are also wonderful vehicles for subverting cherished legal principles such as judge the act not the actor; distinguish clearly between the relevant and the irrelevant; decide only on the basis of evidence presented; and so on. Stories may be accepted because they are familiar or reassuring or memorable rather than because they are true. Good stories tend to push out true stories (as in this piece?). But stories are also widely perceived as important, maybe even necessary, not only to fill in gaps or to complement rigorous logical analysis or 'to make sense of a case' (whatever that may mean), but also as *part of an argument*. This raises profound philosophical questions about our conceptions of rationality. One possible clue lies in John Wisdom's conception of 'case by case argument' and the distinction between 'this is a clear case of X' (particular) and 'defining X' (general). Some of Lord Denning's most admired judgments, such as his dissent in *Candler v Crane Christmas*, illustrate this idea.⁹

A second theme relates to law, literature, and theology. In recent years it has been fashionable to push quite far analogies between interpreting literary texts and legal texts. But the problems of interpreting religious texts such as the Bible may be more closely analogous to interpreting statutes, precedents, and other legal texts, especially when they are authoritative. Again the interaction between the general and the particular provides a link between inferential reasoning and interpretation of texts.

A third theme concerns relations between reason, imagination, and law. Stories are not the only seductive thread in the links between law and literature. Fashionable ideas about 'post-modernism' have reached legal theory largely through literary theory. Again, such ideas are important, but dangerous. Post-modernism has done much to undermine simplistic views of interpretation and to challenge

sharp dichotomies between fact and fiction, reason and imagination, objectivity and subjectivity. These are healthy challenges, but they can descend into extreme forms of irrationalism, irrationalism, or relativism that threaten ideas worth defending – in evidence these include such notions as miscarriages of justice, reasonable doubt, and convincing evidence (e.g. of weapons of mass destruction). Ways out of the impasse are suggested by the work of C. S. Peirce and his fictional ally, Sherlock Holmes (abduction, imaginative reasoning), and by the imaginative post-modernism of Italo Calvino, who glories in the world's complexities without giving up on a distinction between what is out there (ontology) and our capacity to grasp it (epistemology).¹⁰ Calvino's Mr Palomar nearly has a nervous breakdown when he tries to describe a single wave or a small patch of lawn, but he does not give up on the idea that there is one real world largely independent of our knowledge of it.¹¹

Themes about the interaction between the general and the particular, law and fact, parables and precedents, reason and imagination, and narrative and persuasion form the core of the next four chapters.¹² Chapter 9, 'Lawyers' stories', a preliminary exploration of the area, was my contribution to the Warwick workshop in 1987. Chapter 10, is a succinct restatement of the thesis that both generalizations and stories are necessary but dangerous in argumentation about contested issues of fact, but in different ways, and suggests the connection between them. Chapter 11 uses the parable of the Prodigal Son to explore analogies between interpretation of texts and of evidence in law and theology. Chapter 12, 'The Shakespearean and the Jurist', tells the story of how two scholars independently analysed the case of *R. v Bywaters and Thompson* and contrasts their approaches, both of which combined narrative and logical analysis, but used strikingly different methods. This chapter provides a concrete illustration of the application of Wigmorean analysis to a particularly complex case. At the same time it raises issues about the transferability of principles and techniques of inferential reasoning across different disciplinary contexts as part of a project to explore the idea of evidence as a multi-disciplinary field in its own right, a theme which is pursued further in the final chapter.

* Originally published in 2004 in Max Leskiewicz (ed.) *Law, Memory and Literature* as a *jeu d'esprit*, this revised version is intended to mark a transition and to introduce the remaining essays in the book with particular reference to two major themes: the relationship between narrative and argument, and evidence as a multi-disciplinary field.

1 Some of the papers were published in Nash (ed.) (1986).

2 B. Jackson (1985), (1988a).

3 Lubbock (1929); Forster (1949); *GJB*, ch. 2.

4 Simpson (1984b), (1995).

5 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, KB; *Candler v Crane Christmas* [1951] 2 KB 164, CA; *Lloyds Bank Ltd v Bundy* [1975] QB 326, CA; *Miller v Jackson* [1977] QB 966, CA.

- 6 Below 303–5. The main criticisms of this passage are that in a single paragraph Lord Denning (a) invents facts (‘The animals did not mind the cricket.’); (b) makes statements that are plainly untrue (‘cricket is the delight of everyone’. The Millers?); (c) introduces irrelevant facts (‘they have played for these 70 years,’ ‘newcomers’ – but it was no defence that the plaintiff came to the nuisance (*Sturges v Bridgman* (1879) 11 Ch D 852, CA); (d) compounds the fault in (c) by rhetorically repeating the irrelevant facts several times – newcomer, newcomer, newcomer; 70 years, 70 years, 70 years; (e) suppresses facts (the Millers had a baby); and (f) gives a misleading impression that the Millers were alone in complaining. Overall he shows overt bias against the plaintiffs.
- 7 By emphasizing the potential for abuse of stories, I may sometimes have given the impression that I am hostile to ‘the narrative’ turn in academic law. On the contrary, I have long been fascinated by stories and their appeal and recognize the importance of narrative in challenging abstract, formalistic and excessively ‘scientistic’ tendencies. I agree with Gyora Binder that: ‘Of course, while fiction is always narrative, narrative is not always fictional. Nevertheless, the association of narrative with fiction identifies it with imaginative literature. To call a story a narrative is to emphasize the imaginative activity of a narrator. We expect a “narrative” account of events, even if factual, to reflect a particular, and often highly imaginative point of view’ (Binder, 1999). See further *GJB*, ch. 1.
- 8 Hastie, Penrod and Pennington (1983), Pennington and Hastie (1991), Bennett and Feldman (1981).
- 9 See 300–3.
- 10 Especially Calvino’s wonderful *Invisible Cities* (1974) discussed *GJB*, 299–309.
- 11 Calvino (1985).
- 12 These four chapters are a selection of my writing in the area. See also Twining (1999), (2000a) chs. 6–8, and *GJB*, chs. 1, 9, 13 and 14.

Lawyers' Stories

I understand that his strength as an advocate lay not in his powers of oratory, but in the reasoning and persuasiveness of the arguments by which he tried to bring the court round to his point of view. He continued to use his powers of persuasion when he was sitting as a Lord of Appeal and would come home and say that he thought that he had won his 'brothers' over to his side or 'so-and-so is still not convinced but I think he may be tomorrow.' He certainly persuaded his family that he was right. When he gave us the facts of a case and asked us what we thought about it, his way of presenting the problem was such that there was never any suggestion in our minds that the other side could have a leg to stand on. E. Cockburn Millar on her father, Lord Atkin¹

Might it be suggested that the central act of the legal mind, of judge and lawyer alike, is the conversion of the raw material of life . . . into a story that will claim to tell the truth in legal terms? James Boyd White²

Introduction

Once upon a time, Rhetoric was central to the humanities and forensic oratory was central to Rhetoric. In the long and complex story of rhetorical studies, the forum ceased over time to be the main arena and persuasive oratory was displaced as the main object of study. Conversely, the discipline of law lost touch with Rhetoric. Demosthenes, Cicero and Quintilian are almost entirely ignored in contemporary legal studies.³ When jurists cite Aristotle, it tends to be the *Ethics* or *Politics* rather than the *Rhetoric*. Of course, practising lawyers still practise advocacy and they elicit, translate, construct, narrate, distort and attack stories as part of their art of persuasion. Legal theorists, on the other hand, have written a great deal about the reasoning of judges, especially appellate court judges, but have paid remarkably little attention to the argumentation of advocates, especially where it is the facts or the sentence rather than the law which is in dispute. 'Narrative' features hardly at all in discussions of legal reasoning; 'rhetoric' when applied to the discourse of a judge or even an advocate usually implies criticism.⁴ One might infer from this that rhetoric and narrative have little or nothing to do with legal reasoning and so, by implication, are consigned to the dubious sphere of 'irrational means of persuasion'. On such a view, Lord Atkin's daughter's account of her father may be interpreted as

an example of a skilful advocate, either through conscious trickery or unconscious bias, winning his family over by non-rational means. Is that the only or even the most plausible interpretation?

This essay is one of a series of exploratory studies of the role of narrative in general culture. It challenges any suggestion that narrative has a marginal role of dubious legitimacy in legal discourse; it also challenges the converse idea that constructing stories is 'the central act of the legal mind' as White and others have suggested.⁵ The essay focuses mainly on one class of legal discourse, forensic advocacy in modern Anglo-American courts. In particular, it addresses the question: What, if any, are legitimate functions of narrative in *rational* argument by advocates on disputed questions of law and disputed questions of fact? In the course of what is a preliminary exploration, I shall suggest that narrative probably plays a variety of roles in advocacy: some of these roles are unavoidable and legitimate, but are more to do with communication than with rational argument and persuasion; that narrative can be used in ways that would be considered to be illegitimate or dubious, judged by conventional standards of ethical advocacy; but that narrative also has some important, legitimate contributions to make to rational argument by lawyers and that some of these roles fit uneasily with some standard accounts of lawyers' reasonings. The focus is normative rather than empirical; the examples used are illustrative rather than representative.

The discourse of advocates in court is only one kind of legal discourse. A wide variety of actors and commentators participate in law talk and talk about law in an even wider variety of contexts. Judges, law-makers, office lawyers, legal scholars, teachers of law, historians, journalists, novelists and all citizens regularly produce and consume legal discourse.⁶ It is widely accepted by contemporary legal scholars that litigation is just one species of legal and law-related action and that what happens in open court is only one, often atypical, phase of the total process of litigation. There is debate among legal theorists as to how far the contested trial, the dialectics of adversary proceedings and the reasoned judicial decision are paradigmatic, or representative, or central forms of legal life and discourse. We need not enter these debates here, but it is relevant to state that I am personally sceptical of such claims.⁷ For one message of this essay is a reminder of complexity. There are many kinds and contexts of legal discourse; there are many kinds and phases of litigation; any litigated case is likely to prove on examination to be an extremely complex kind of social process. It would be unwise to start on an exploration of the role of narrative in legal discourse by anticipating that there will be global or reductive answers.

My colleagues in law may think it surprising, even eccentric, to begin such an exploration by focusing on the discourse of advocates. For there are other types of legal discourse that are much better documented and more extensively studied and analysed. We have in reported judgments, in legislation, in legal textbooks, and secondary writings about law, for example, a rich treasury of accessible and familiar texts. Compared to these, advocates' arguments are only spasmodically documented and, at least in modern times, they have been relatively under-theorized.⁸ I accept

that a systematic narratology of legal discourses, especially one that is to have a sound empirical base in concrete and representative examples of such discourses, has to engage with our general heritage of texts of different kinds and our stock of theorizing about them.⁹ There are, however, two related reasons for using a different starting-point. First, the situation, purposes, role and audience of the advocate in court are typically clearer or less problematic than those of the judge or the jury or the expositor.¹⁰ *The primary task of the advocate is to persuade this tribunal to decide in favour of this client in respect of previously defined issues of law and/or fact and/or disposition.* By focusing on a relatively uncontroversial kind of actor one may be able to skirt, rather than plunge directly into, the morass of controversies surrounding theories of adjudication and other familiar areas of juristic debate. We shall not be able to avoid getting our feet wet, but we may be able to paddle before trying to swim.

A second reason is that a central concern of narratology is the role of stories in rational argument. While some aspects of the advocate's role are considered relatively unproblematic, questions about what constitute 'rational' and 'irrational', legitimate or illegitimate techniques or modes of persuasion are central, sharply posed questions in any theory of advocacy. In order to keep matters simple, I shall concentrate on three tasks of the advocate that are generally regarded as distinct: arguments about disputed questions of fact; arguments about disputed questions of law; and arguments about sanctions, such as arguments about the amount of damages to be awarded in a civil action or pleas in mitigation of sentence in criminal proceedings.

In legal theory the distinction between questions of fact and questions of law is recognized to be analytically problematic.¹¹ It is also recognized that determinations of fact and law in particular cases have an artificial all-or-nothing character (guilty/not guilty, liable/not liable). The winner takes all.¹² By contrast, the determination of sanction tends to be more open-ended, involving a choice between a range of possibilities within varying limits, such as maximum (and less frequently, minimum) penalties.

These distinctions have practical consequences for advocates. Whether a question is classified as one of fact, law or disposition may determine the arena, the audience, the timing and the style of presentation. In simplified form, questions of law are for judges; questions of fact are for the jury or other triers of fact; questions of sentence are usually for the judge. Elaborate rules govern which kinds of issue are subject to appeal or review in a higher court. There are reasons for adopting the working assumption that these three kinds of argument represent three different kinds of task, each with a distinct kind of discourse appropriate to it. Later we shall need to consider the relations between them.

A lexicon of advocacy

The discourse of advocacy, as found in manuals, trial records and informal conversation, contains relatively few terms of art. In so far as there is a distinctive

vocabulary, much of it has recognizable roots in the formal rules of procedure and evidence, in classical and medieval rhetoric and in drama. Contemporary Anglo-American manuals of advocacy¹³ contain a number of key terms that are useful for present purposes: theory, story, situation, scene, scenario, theme and thelema. Even the best English and American manuals tend to adopt an informal, often chatty, style in which precision is sometimes sacrificed to readability. A rather more exact vocabulary is needed for purposes of theoretical analysis. Accordingly, I propose to stipulate some definitions and make some distinctions that are more precise than ordinary usage.

Theory

An advocate's 'theory of the case' is his argument about the case as a whole.¹⁴ It should be capable of being expressed in the form of a logical and coherent statement of the reasoning supporting the desired conclusion. A summary statement of such a theory should take the form of a precis of a complex argument. To take some simple examples:

- 1 Where the only issue is a question of fact:
 - (a) 'The prosecution has failed to produce sufficient evidence that it was the accused who committed the alleged crime'; or
 - (b) 'The evidence shows that my client was in another city at the time of the murder and therefore he could not be the murderer'; or
 - (c) 'The evidence shows that the deceased was killed accidentally during the course of a struggle in which he was trying to stop the accused from committing suicide by shooting herself.'¹⁵
- 2 Where the only issue is a question of law:
 - (a) 'Authority, principle and reason support the proposition that a professional person owes a duty of care to a non-professional in respect of advice given in circumstances X, Y and Z. The facts of this case are a clear example of this type of situation';¹⁶ or
 - (b) 'This case is new. It should be approached on principles applicable to modern conditions rather than on outmoded nineteenth-century precedents and values. Authority, principle and policy based on modern values support the proposition that the public interest should prevail over the private interest where there is a conflict between reasonable and long-established uses of land in the interest of the public at large (such as village cricket), and the private interest in enjoyment, without interference or risk of injury, or damage to adjacent property which has recently been developed.'¹⁷
- 3 In a plea in mitigation:

'Notwithstanding the seriousness of the offence, the facts that my client has an unblemished record, has shown contrition, is unlikely to repeat the offence, has good prospects of employment, and has a dependent family combine to support the conclusion that a custodial sentence would be inappropriate and could serve no useful purpose in this case.'

Manuals of advocacy, especially those concerned with trial techniques, stress the importance of developing and maintaining a clear and cohesive theory of the case as a whole: 'It is essential to develop a theory of the case before trial and act in accordance with it throughout the trial itself.'¹⁸ The theory provides the basis for the advocate's strategy which will guide all his choices and actions throughout the proceedings.

This conception of 'theory' serves the function of isolating that aspect of advocacy which is concerned with rational arguments from other aspects, such as commanding attention, communication, questioning, persuasive presentation and various courtroom tactics. The conception is also analytically convenient in that it provides a clear connection with theories of legal reasoning.

In standard, but not entirely uncontroversial, accounts of legal reasoning, the paradigm example of 'a case as a whole' takes the following form: 'If X then Y; if Y then Z.' Here X represents the *circumstances* governed by the rule; Y represents the *legal effect* (guilt or liability); and Z represents the *sanction* or consequence. For example, 'Whenever a person intentionally and with malice aforethought causes the death of another without lawful justification, that person is guilty of murder. Where a person is guilty of murder, that person shall be condemned to death (unless . . .).' On this view, the paradigm case of a disputed question of law is: 'What is the scope of X?' Or 'Do circumstances a, b, c, constitute a case of X?' The paradigm case of a disputed question of fact is: 'Does the evidence support the conclusion that X happened?' The paradigm case of an issue in sentencing is: 'Given X and Y, and in view of M₁, M₂, M₃ (mitigating factors) what is the appropriate punishment in this case?'¹⁹

Story

In the discourse of advocacy the word 'story' tends to be used rather loosely to encompass a party's or witness's version of what happened; or a chronological statement of a sequence of events; or a statement of 'the facts' of the case by a judge or advocate; or the formal allegations (the material facts) set out in the pleadings; or even the advocate's theory of the case.²⁰ In considering the role of narrative in forensic argument, it is important to give the term 'story' a more precise, restricted meaning. Adapting Ricoeur, I propose the following definition: 'A story is a narrative of particular events arranged in a time sequence and forming a meaningful totality.'²¹ In this formulation particularity, time, change and connectedness are all necessary ingredients. But the connections between the events which make the story a totality need not be causal. In this usage, adapting E. M. Forster, 'The King died and then the Queen died' is not a story, but merely a chronological statement; 'the King died and then the Queen died of grief' has the necessary element of connectedness.²² But so does the following: 'The King was reported to have died; the Queen died of grief; in fact the report was false, for the King had been feigning death in order to evade an assassination attempt.' Although this last narrative does not follow a strict chronological order and its connectedness does not depend on causation alone, it

counts as a story. For the rest of this essay I shall equate narrative with storytelling: one narrates stories, but describes situations.²³

There is an intimate relationship between ‘theories’ and ‘stories’, but it is important to keep them conceptually distinct. The distinction and the relationship can be illustrated by the closing speech for the Crown by Archibald Bodkin QC in the case of George Joseph Smith (the ‘Brides in the Bath Case’). Smith was accused of murdering Bessie Mundy by deliberately drowning her in a bath in a rented house in Herne Bay. The crux of the case was whether her death was caused by accident or design. The defence theory was that she drowned during an epileptic fit. The evidence concerning the cause of death was circumstantial and inconclusive. In Bodkin’s opening speech, and during the trial, the jury had been presented not only with the story of the course of the relationship between Smith and the deceased and of its aftermath, but with two other stories of deaths of Smith’s ‘brides’ who had died in similar, unexplained circumstances. Bodkin’s closing speech takes up only four paragraphs in the record. The last half reads as follows:

The prisoner and the woman being alone in the house, he had the opportunity of committing the crime. The motive of the prisoner has been demonstrated, the opportunity admitted, and the exclusion of accident proved. You are entitled to look at the evidence as to the two other deaths to see whether the death of Miss Mundy was accident or designed, and, if designed, for the benefit of whom? You can also look at that evidence to see whether the death was part of a system or course of conduct – horrible as it is to think so – of deliberately causing people’s deaths in order that monetary benefit might ensue to him.

The three cases are of such a character that such a large aggregation of resemblances cannot have occurred without design. In each case the prisoner went through the form of marriage; in each case the ready money of the woman was either realized or drawn out of whatever deposit bank it might have been in; in each case there was a will drawn in favour of the prisoner absolutely; in each case the will was drawn by a stranger to the testatrix; in each case the victim insured her life or was possessed of property which did not make it necessary to insure her life; in each case there was a visit to a doctor shortly before the death, which, we contend, was unnecessary from the physical condition of the patient; in each case the women wrote letters to relatives the night before, or on the night on which they died; in each case there was an inquiry as to a bathroom drowning, and the prisoner was the first to discover it; in each case the bathroom doors were unfastened and the water was not drawn off until after the doctor had been; and in each case the prisoner was putting demonstrably forward the purchase of either fish, or eggs, or tomatoes to show that he was absent from the house in which his wife was lying dead; and in each case there was the prisoner’s subsequent disappearance and the monetary advantage resulting or attempted to be made to result.²⁴

This is generally regarded as a classic of advocacy. It is misleading to treat it as an example of narrative discourse. Rather it is more accurately described as an

argument directed to a single issue (design). It proceeds by analysing and comparing three stories in order to fill a crucial gap in one of them, the story of the death of Bessie Mundy. Bodkin was *arguing* about one part of a story rather than narrating. The argument supports the prosecution 'theory' that Smith intentionally caused the death of Bessie Mundy. We could not give an account of the case without some notion of story – for it is a reasonably clear example of a jury having to choose between competing stories – but that is different from saying that Bodkin was here using story-telling as a technique of persuasion.

It may be objected that such notions as telling stories, stating the facts and narrating as they are ordinarily used in the discourse of advocacy do not correspond with the notion of 'story' as it was defined above.²⁵ For example, the predecessors of the serjeants-at-law were the '*narratores*' or 'counters' whose primary task was to present the plaintiffs *narratio* to the Court of Common Pleas. But the '*narratio*', far from being a story, was a formal statement of claim that fitted a strictly limited set of categories. The primary skill of the *narratores* was 'in fitting the facts alleged by their clients into the appropriate mould'.²⁶ The art was not to tell stories, but to translate them. It was a sophisticated form of classification, more like form-filling than story-telling.

Similarly, in an argument on a question of law 'stating the facts' of the case before the court, or 'stating the facts' of some precedent used in argument does not necessarily involve telling a 'story' *stricto sensu*. For example, the material facts may concern a situation or state of affairs rather than a sequence of events; or the facts may be stated in a way which corresponds precisely with the elements of a crime or tort or other cause of action. Although typically presented less formally than the medieval *narratio*, a statement of the material facts of a case is only one step away from form-filling, especially in the case of written pleadings.

This line of argument raises two important issues. First, it can be readily conceded that there are many cases in which advocates are not involved in explicit story-telling at all. An argument about interpretation of a statute conducted at a general level; a defence based on a simple alibi; a plea in mitigation which emphasizes factors other than the accused's version of and attitude to the crime are all simple examples. Whether stories are necessary elements of an argument about 'a case as a whole' will be considered below.²⁷

Secondly, can a sharp distinction be drawn between form-filling and storytelling? 'On 5 March X intentionally and with malice aforethought stabbed Y, who died from his wounds on 6 March' contains all the ingredients of the crime of murder and satisfies the formal definition of a story, viz. it is a sequential narrative of particular events that forms a whole. We normally expect stories to be more detailed, colourful and interesting, but analytically the bare-bones statement of alleged facts in a statement of claim or an indictment will often (but not always) satisfy the requirements of a 'story'.²⁸ Indeed the element of configuration or connectedness that make this account into a story is that the events narrated amount to a legally significant action, such as a murder.

Situation

A situation is a state of affairs at a given moment of time. An account of a situation is like a snapshot or a picture. It is a configuration, but neither chronological sequence nor change are necessary ingredients. The distinction between ‘situation’ and ‘story’ is important in law, because the law is often concerned with momentary or static states of affairs. For example, someone may be responsible for a car with defective brakes or driving without a licence or owning a factory that violates Health and Safety Regulations irrespective of how the state of affairs came about.²⁹ Again, a plea in mitigation may focus wholly or in part on the situation of the defendant at the time of sentence and his or her likely future behaviour, without regard to his version of the story of the crime. Stories and descriptions of states of affairs have some shared features; but there are also important differences. However, most of what I have to say about stories in this context applies *pari passu* to descriptions of situations.

Scene, scenario, context

Advocates often talk in terms of ‘setting the scene’, ‘developing a scenario’, ‘painting the canvas’, and the like.³⁰ Sometimes what is meant is covered by or overlaps with the notions of ‘story’ and ‘situation’, as they were defined above. However, such talk typically suggests something additional in the way of ‘background’ or ‘contextual’ elements which are not essential parts of the story or situation, but which may nevertheless be helpful in understanding or grasping it. In fiction or drama or painting it is often difficult, if not impossible, to distinguish sharply between background and foreground, between scene and scenario, between context and substance. Legal argument on questions of law and of fact is supposedly characterized by strict and generally well-understood criteria of relevance which provide a basis for such distinctions.³¹ One hypothesis, which we shall explore later, is that one function of narrative in advocacy is to allow in much more by way of context and background than is technically permitted in explicit argument.

Theme

‘Theme’ is another term that is used ambiguously in the literature on advocacy. Sometimes it is used to refer to the overall characterization of the situation or story or some element of it that appeals to a popular stereotype. For example: ‘This is an example of a grasping landlord exploiting a helpless tenant’; or ‘This is a case of property developers needlessly desecrating the countryside.’ Another, more precise usage, which is useful in the present context, refers to any element that is sufficiently important to deserve emphasis by repetition. An English barrister gives a vivid account of what he calls ‘the mantra’, as follows:

In almost all cases there will be a key factor which has played a dominant role in the case from your point of view. It may be ‘stupidity’, ‘fear’, ‘greed’, ‘jealousy’, ‘selfishness’. Pick your word, inject it into your opening. Put it on a separate piece of paper. Repetition

will have a lasting effect. If you have hit the right note and have repeated it often enough, it will echo in the Jury's mind when they retire. It will be the voice of the 13th Juror. Try to hit the note as soon as possible in opening.³²

Thelema

A constant refrain of manuals on advocacy is the importance of winning the trust and sympathy of the tribunal and of providing them with the means of reaching the result you want: '[A]im from the outset to capture and keep the sympathy of your audience.'³³ 'Aim to be the honest guide.'³⁴ 'You have got to be trusted.'³⁵ 'Maintain your status.'³⁶ 'Show them the way home.'³⁷ These are just some of such precepts set out in a recent introduction to *Advocacy at the Bar*. Such advice, typically presented in the form of discrete precepts, is usefully encapsulated by an American judge in a single concept:

Thelema is a generic term denoting the universe of things which can combine to create, in judge or jury, the desire to help. I pick an unknown word, which can precisely be defined without pruning away the semantic accumulations of similar words, such as; favor, appeal, sympathy, motive, beneficence, empathy and the like. The meaning of thelema, in Greek, is all of these things.³⁸

Presentation and argument

I suggested earlier that the advocate's role in court is less problematic than that of other legal actors. It is to persuade this tribunal to decide in this case in favour of his or her client. It does not follow that the job is either simple or easy. In a contested trial it can be extremely complex, involving multiple tasks or sub-roles. In the popular metaphor of drama, the advocate may have to combine the roles of producer, stage-manager, actor, narrator and even, within limits, script-writer. In appellate cases and pleas in mitigation there are fewer participants, but the task is not necessarily easier. Indeed, Shapland reports that some barristers consider that 'doing a good mitigation is one of the higher tests of advocacy and is often very much harder to do than to do a successful contested fight'.³⁹ In so far as adjudicators are meant to decide on rational grounds, the task of the advocate is to persuade by rational means. On this view, the role of the advocate is to *present an argument* and that is implicitly recognized both in the notion of 'the theory of the case' and in the key role accorded to it in organizing and guiding the advocate's performance. However, especially in contested trials, the argument is not presented solely in terms of explicit argumentation. The story of a case is not merely told in the speeches of counsel: the evidence is typically presented by a succession of witnesses through direct examination, cross-examination and re-examination. Sometimes witnesses are allowed to 'narrate' their testimony, but often they are confined to answering questions. Some complain that they were prevented from telling their story.⁴⁰ In disputes on points of law the advocate has a much more straightforward role in presenting explicit argumentation, but even then part of the argument may proceed

by question and answer. Similarly pleas in mitigation may involve not only a speech but also testimony and comments on written reports (such as social enquiry reports, medical reports, antecedent reports).⁴¹

In the present context this has a two-fold significance. First, an advocate's 'argument' may be more or less implicit and may have to be reconstructed from material that has been presented to the court. Secondly, the notion of argument needs to be distinguished from the manner and style of its presentation. Manuals of advocacy tend to devote far more attention to presentation than to construction of cogent arguments.⁴² They emphasize the importance of attracting and retaining attention; of being clear, comprehensible and succinct; of body language and other non-verbal communication, and of all that is encompassed by the notions of theme and thelema. There is, as we all know, much more to the art of persuasion than making logically cogent arguments. Clearly stories have a role to play in arousing interest, in maintaining attention, in winning thelema and in setting the context for argument. But, one may ask, what role, if any, do they play in *rational* persuasion? And, closely related to this, by what standards are we to determine the legitimacy or otherwise of the uses of narrative in advocacy?⁴³

We have seen that not all arguments by advocates involve explicit storytelling. However, it is generally thought that story-telling is indeed a central skill of advocacy in respect of each of the three standard tasks with which we are concerned. Thus in a contested trial on disputed facts the prosecution is typically required, and the defence has the opportunity, to outline their respective 'cases' and very often this consists of presenting the facts in narrative form. At later stages in the trial counsel for each side may retell the story, or part of it, directly or have it told through witnesses. It is commonly said that in contested trials in the adversary system juries have either to choose between two competing stories or to construct a third from what has been presented to them.⁴⁴ In many criminal trials the defence takes the form of attacking or casting doubt on the prosecution 'story' without offering an alternative account.

Less obviously, narrative is recognized to be of critical importance in appellate advocacy (or other cases involving questions of law). 'The statement of facts is the heart' is a well-known dictum. Perhaps the classic statement is by John W. Davis, a highly respected leader of the Bar in the United States: '(I)n an appellate court, the statement of the facts is not merely a part of the argument, it is more often than not the argument itself.'⁴⁵ The precise meaning and significance of such precepts will have to be considered in some detail.

The role of stories in pleas in mitigation is recognized to be more problematic. Officially the prosecution's story has already been accepted and cannot openly be challenged. Where the accused has pleaded not guilty and has been convicted, he/she has already had an opportunity to tell his/her story and it has been rejected. The plea in mitigation has to be made in the context of an already defined version of what happened. Some mitigating factors may gloss or supplement the existing story, but others may relate to 'extraneous' matters such as the accused's past record, his

present attitudes or situation, and the likelihood of repetition of the offence. Where, however, the accused has pleaded guilty the situation is rather different. Although the truth of the prosecutor's allegations is acknowledged, it has only been in bare-bones form. The accused has not yet had a chance to present his or her version to the court and may wish to do so. While the truth of the charge(s) may not be directly challenged, there is generally some scope for putting the story in a different light by retelling all or part of it in person or through the advocate.

Thus it is claimed that stories feature in all three kinds of advocacy, though with differing degrees of frequency and importance. However, it cannot be assumed that their role in each context is identical. Let us, then, look at some of these claims in more detail.

Arguments about questions of law: stating the facts

On the orthodox view a contested question of law involves a disagreement about the *general* scope of a rule or norm or principle (interpretation) or whether a *particular* set of facts fits within it (application). By convention, an argument about an issue of law is conducted on the basis that the facts are given – it proceeds *as if* the facts are true. Conversely, an argument about a disputed issue of fact proceeds *as if* the applicable law is settled. Both legal theory and legal practice recognize that these conventional distinctions are not unproblematic.

If in an argument about interpretation or application of law the facts are treated as given, what are we to make of the claim that the statement of the facts is 'not merely a part of the argument, it is more often than not the argument itself'?⁴⁶ The best-known, and probably the most theoretically sophisticated, explanation was advanced by Karl Llewellyn:

It is trite that it is in the statement of facts that the advocate has his first, best, and most precious access to the court's attention. The court does not know the facts, and it wants to. It is trite among good advocates, that the statement of the facts can, and should, in the very process of statement, frame the legal issue, and can, and should, simultaneously produce the conviction that there is only one sound result. It is as yet less generally perceived as a conscious matter that the *pattern* of the facts as stated must be a *simple* pattern, with its lines of simplicity never lost under detail: else attention wanders, or (which is as bad) the effect is submerged in the court's effort to follow the presentation or to organize the material for itself.⁴⁷

This explanation contains at least three elements: securing the court's attention; framing the issue; and producing conviction. In the context of Llewellyn's wider theory of appellate judging and advocacy, there are two other points. First, he makes it clear that he considers that skilful statement of the facts is an element of *good* advocacy in the sense that it is legitimate and ethical and a hallmark of excellence. Llewellyn was much concerned with the ethics of advocacy and he was careful to distinguish those techniques which were, in his view, clearly legitimate from those

which were illegitimate or of dubious legitimacy.⁴⁸ Secondly, Llewellyn maintained that what constituted a good argument by an advocate (on questions of law) and a good justification by a judge are to be evaluated by the same criteria. The role of an advocate is to advance the best justification for a decision. The statement of facts by the judge as much as by the advocate is (part of) the ‘heart’ of the argument.⁴⁹

Let us, for the sake of simplicity, treat some elements of Llewellyn’s theory as uncontentious. We can accept that it is both legitimate and important for an advocate to seek to secure the attention and interest of the court. We are not concerned here with examples of techniques of advocacy that Llewellyn would treat as clearly illegitimate, such as lying, deliberately misleading the court, inventing facts, or adopting diversionary or consciously obfuscatory tactics.⁵⁰ Our concern is with excellence, not just with effectiveness. Finally, let us proceed on the basis that there is at least a sufficient overlap between standards of excellence in argument, by judges and advocates, to justify looking at examples of statements of facts in reported judgments.⁵¹ This is convenient, because texts of reported judgments are more accessible, extensive and familiar than verbatim reports of appellate arguments by advocates.⁵²

If these points are accepted, at least two aspects of Llewellyn’s explanation require clarification. What is the role of the statement of facts in framing the issues? And, why is the statement of facts considered so important in producing conviction about the answer to a question of law? The answers to both questions depend on one’s view of the relationship between the general and the particular in legal argument in the common law tradition. Llewellyn’s answer to the first question looks like a restatement of a familiar and orthodox position. His answer to the second has occasioned both puzzlement and controversy among jurists.

Llewellyn’s position on the first question can be restated as follows:⁵³ it is a general principle of common law adjudication, subject only to a few exceptions, that courts will decide only questions arising out of actual disputes. Generally speaking, they will not give rulings on hypothetical facts or answer questions of law posed in general terms, divorced from some concrete fact-situation. The essence of case-by-case adjudication is to respond to problems that arise from some particular real life situation. Before legal argument begins the issues have been ‘limited, sharpened and phrased in advance.’⁵⁴ But, as every common lawyer knows, there is considerable leeway as to the precise level of generality at which a question of law is posed and answered. In Llewellyn’s terms the issues are ‘*reasonably but not rigidly clarified in advance*’.⁵⁵ The initial statement of facts, by advocate or judge, provides an opportunity for suggesting the categories to be used and the appropriate levels of generality for formulating with greater precision the problem or issue that arises from the facts. How one characterizes the problem depends upon how one characterizes the facts. To put the matter in formal terms: the statement of facts takes the form ‘X happened’; the question of law is: If X happens, what is the legal effect? The answer to that question (one usage of the term *ratio decidendi*) takes the form: ‘If X, then Y’. X is a common factor linking statement of facts, the question of law, and

the applicable rule (the answer to the question of law). How X is characterized is crucial.

Up to this point this looks like a restatement of a familiar and orthodox view of common law reasoning.⁵⁶ But Llewellyn introduced a new concept, 'situation sense', which has occasioned a good deal of puzzlement and controversy. Some have adopted the term uncritically, but used it rather loosely; some have viewed it as impenetrably obscure or meaningless; some have rejected it as introducing an irrational or subjective or metaphysical element into theories of legal reasoning. I have explored some of the problems associated with Llewellyn's account of 'situation sense' elsewhere. Here I wish to concentrate on its function in respect of the claim that 'The Statement of Facts is the Heart'.⁵⁷

What kind of statement of the facts of a case by a Grand Style judge or advocate satisfies the requirement of 'situation sense' and, because of this, 'can produce the conviction that there is only one sound outcome'?⁵⁸ The first requirement is that the facts of the particular case are stated in terms of categories that are directly translatable into a recognizable 'type-fact-pattern'.⁵⁹ The facts are categorized in such a way as to form a clear example of the situation seen as a *type*. Secondly, the type-fact-situation, so characterized, appeals to 'sense', 'reason' and 'justice' in such a way as to suggest a general solution to the problem raised by the particular case.⁶⁰ Factors in the unique story which are likely to arouse sympathy or antipathy – 'the fireside equities' – are filtered out or given a secondary role.⁶¹ Thus X is a constituent in the process of translation from the statement 'X happened' to the statement 'This is a case of type X' and again to the statement 'Whenever X happens, Y ought to happen.'

But, it may be asked, what makes one particular characterization of X appeal to 'sense, reason and justice'? And, why should there be any difference in the persuasiveness or the cogency of an argument by presenting it in the form of a statement of the facts of the particular case rather than explicitly as a formulation of a general fact-pattern or as a rule?

Let us consider three possible ways of answering those questions that represent three different interpretations of the claim that 'the statement of the facts is the heart'.

The first, and weakest, answer acknowledges that there is no analytical difference in the characterization of X in statements of the kind 'X happened'. 'This is a case of type X' and 'Whenever X happens, Y ought to happen.'⁶²

However, the advocate who takes care to formulate his statement of the facts in such a way achieves two things. First, a good foundation for the argument is laid at the very beginning. What is initially implicit can be made explicit by subsequent elaboration. Secondly, it ensures that there is complete harmony between the initial statement of the facts and the general proposition of law that is being argued for. The facts and the rule are not merely consistent; analytically they are the same. On this interpretation, the precepts we have been considering contain sound advice in exaggerated form. For the statement of facts is not 'the heart' of the argument, nor

is it 'the argument itself'; rather it anticipates one crucial step in the argument, the formulation of the applicable rule.

A second interpretation is that the statement of facts allows implicit appeals to values or 'sense' (whatever that is) in a way which would be either less effective or perhaps even impermissible if it were done explicitly at a general level. Gerald Lopez puts the matter thus:

While debate over what the facts mean (argument) is encouraged to be more explicitly persuasive than debate over what the facts are (story-telling), argument as an act of persuasion is constrained in most cultures in a way that story-telling is not . . . stories by their very nature can appeal to what is, by convention, still taboo in a culture. Because facts themselves capture and reflect values, what cannot be argued explicitly can be sneaked into a story. Indeed the genius of story-telling as an act of persuasion is that it buries arguments in the facts. Stories can thereby circumvent the existing constraints on the meaning that can be given to the facts as found. Put differently, relevance is for a story a much looser standard than it is for argument.⁶³

This is a perceptive account of some reasons why advocates consider the statement of facts to have an important role in the task of persuasion. But is this consistent with an ideal of argument that is legitimate, ethical, fair? Lopez acknowledges that 'this sounds very much like hypocrisy . . . Yet in some ways hypocrisy is necessary to civilized life.'⁶⁴ On the other hand, jurists of an earlier generation have tended to emphasize articulation, explicitness and openness as important safeguards of honest and wise argument. 'Covert tools are never reliable tools,' wrote Karl Llewellyn⁶⁵ and John Henry Wigmore already emphasized the utility of articulation of the implicit as a check on the validity and cogency of arguments about evidence.

A third interpretation makes a positive virtue of appeals to implicit, unexpressed or dimly perceived factors. In this view, far from being a matter of 'sneaking in' such factors or of licensed hypocrisy, narrative has a positive role to play in generating a pressure towards 'the inexpressible, the inexplicable.'⁶⁶ The most articulate proponent of the role of the inarticulate in legal argument is James Boyd White, a professor of both literature and law, who has developed a sophisticated, if somewhat idealized, view of the role of narrative in legal discourse.⁶⁷ Others talk in terms of appealing to intuition, emotion, or the imagination. Some rationalize this in terms of giving a legitimate place to appeals to 'irrational' considerations; others advance this in terms of differing conceptions of rationality.

Even Llewellyn's views fit this third interpretation. His glorification of the common law tradition and of the Grand Style of judging is based in part on the idea of courts being responsive to the nuances of complexity and change through a special sensitivity to facts that reaches beyond existing legal categories. I have argued elsewhere that one can only make sense of 'situation sense' by including in it some notion of 'judgement' that outruns our capacity to construct articulate and logical justifications for what is felt to be 'just' or 'wise' or 'to make sense'.⁶⁸ It is beyond the scope of this paper to explore whether Llewellyn can be rescued from charges

of inconsistency in giving a place to such factors while emphasizing the value of articulation and explicit rationalization. Suffice it to say here that I believe that such a defence is possible because, in my view, there is no necessary incompatibility between rational reconstruction and giving play to the legal imagination in normative theories of advocacy and judging.

The judge as advocate: Lord Denning as hero and as deviant

A brief consideration of two of Lord Denning's most famous judgments may cast further light on the notion that 'the statement of facts is the heart'. No English judge in modern times has so regularly and so openly observed the precept that the manner of stating the facts of a particular case has a significant role to play in justifying decisions in disputed questions of law of general significance. His statements of fact have been highly praised, sharply criticized and treated with uneasy ambivalence by fellow judges and by academic commentators.⁶⁹

In *Candler v Crane Christmas* Denning MR (as he then was)⁷⁰ delivered a dissenting judgment which presented an interpretation of the duty of care that was, in due course, accepted by the House of Lords almost exactly in terms of his formulation.⁷¹ It is widely regarded as a great dissent by a Grand Style judge that made legal history. The most famous passage in the judgment reads as follows:

... Did the defendants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. *They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in the company. On the faith of those accounts he did make the investment, whereas, if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money.* In the circumstances, had he not every right to rely on the accounts being prepared with proper care, and is he not entitled to redress from the defendants on whom he relied, I say he is, and I would apply to the present case the words of Knight Bruce LJ in *Slim v Croucher* (1860) 1 DeG. F. & J. 518, an analogous case ninety years ago, where he said: 'A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilisation' [italics supplied].⁷²

This is widely regarded as an example of Lord Denning at his best. Before considering why this should be so, it is worth noting that this passage does not come at the start of the judgment. It contains Denning's third formulation of the facts of the case. The judgment begins with a statement of the facts in a single paragraph.⁷³ This is quite succinct, but more detailed than the version in the passage quoted above. It is a summary statement which through its language and emphasis seems calculated to win sympathy for the plaintiff. Someone reading it for the first time should have no difficulty in predicting the judge's decision; they may also find it quite persuasive. However, its ostensible function is to lay a foundation for a statement of the issue; for those facts 'raise a point of law of much importance'.⁷⁴ After framing the issue, Lord Denning proceeds to a much longer restatement of the facts in a narrative that takes

up more than two full pages of the *All England Law Reports* (about 1,500 words). This very careful and detailed examination contains few 'rhetorical' flourishes; its main function is to make clear that in this case the accounts were intended to induce the plaintiff to invest in the company; and that the plaintiff's loss was 'caused' by this negligent advice. Few 'fireside equities' sneak into this detailed narrative. Its primary function is to establish that there is no doubt that this case does in fact constitute a clear example falling within the general rule for which Lord Denning is arguing.

Lord Denning next considers the decision in the court below, before restating the question of law ('of general importance')⁷⁵ to which this case gives rise. The passage quoted above comes at the start of his consideration of 'the law' on the matter and the authorities which, allegedly, support the defendant. His statement of the facts here is a third reformulation. It is explicitly part of an argument, the gist of which might be rendered: 'Were it not for authority, I should have said that reason and justice and sense dictate that a duty of care exists in this kind of situation.'

He then turns to consider 'Authority'. Professor Patrick Atiyah has observed: 'When Lord Denning begins like this, one can be sure that he will then analyse the authorities in order to come out where he wants to, and this case was no exception. Skilful examination of the cases showed them to be either distinguishable, or else inconsistent with the principles of *Donoghue v Stevenson*.'⁷⁶ This, however, involved a bold reinterpretation of authority, rather than a 'timorous' analysis of the cases⁷⁷ 'not designed to lead to a pre-determined conclusion, but to see what the cases had originally stood for'.⁷⁸ In this view, creative interpretation was required in order to ensure that reason and sense prevailed over a settled view of authority. Despite his hints at impropriety, Atiyah calls this 'one of the great dissenting judgments in the history of the common law'.⁷⁹

What is the basis of this claim to greatness? The power of the argument lies not in any direct appeal to emotion through 'sneaking in fireside equities' or choosing emotionally laden terms. Rather it is persuasive because it suggests grounds both for extending and limiting liability in a type of situation which has the following elements: *reliance* by a *non-expert* on a *professional* in a relationship of *proximity* in which the professional gives *negligent* advice which he *expected* and *intended* would be followed by this plaintiff. The element of reliance links this to a general principle that is widely accepted as justifying liability; but, equally important, the other factors (professional, non-expert, negligence, proximity, expectation, loss) *limit* the scope of the situation and close the door on 'the floodgates argument' which had worried 'the timorous souls'. In short, Denning's formulation characterized and circumscribed the type of situation in which justice, reason and sense suggested that there should be liability. Most of the rest of the judgment is taken up with interpreting (or reinterpreting) earlier precedents and setting strict limits to the scope of the doctrine that he is advocating.

At first sight, Lord Denning's highly persuasive categorization of the facts in his third formulation neither violates any taboos nor expresses in particulars what is inexpressible at a general level. Rather it introduces and neatly encapsulates in simple

and concrete terms the gist of an argument that is thereafter explicitly elaborated at a general level. On this reading, it seems to fit the first interpretation of 'the statement of facts is the heart', better than those of Lopez and White. This, I think, is too simple. For, I shall argue that, read as a whole, Denning's judgment gains some of its force from factors suggested by the other two interpretations.

In the first place, Denning saw this as a case of a conflict between justice and sense, on the one hand, and authority (as conventionally interpreted) on the other. 'The lawyer who argues from justice has a weak case'; but the lawyer who appeals to justice, sense and reason implicitly through the facts is often very persuasive. By judicious use of thelema and theme (*three* statements of the facts!) Denning's judgment appeals to 'reason, sense and justice' before he ever considers a single precedent. Anyone who doubts that his statements of the facts had a key role to play in his argument should try reading the judgment without these passages. 'Grand Style' or 'creative' or 'innovative' judges typically find themselves in situations in which all or most of the authorities seem to be ranged against them. It is a standard technique for them to use careful statements of the facts of the case at hand as part of their arguments for changing or reinterpreting the law. They tend to be at their most effective when, as in *Candler*, there is a high degree of consensus among 'laymen' as to what would be a just or sensible result in the particular case.

At first sight, *Candler v Crane Christmas* looks unpromising as an example of a judge or advocate conveying more through a statement of the particular facts than can be captured by a purely abstract statement. For surely part of Denning's achievement 'was to identify and articulate the ingredients (professional and non-expert; proximity; reliance etc.) that constitute the new rule in an acceptable way. Undoubtedly that is part of the appeal of the famous passage. However, I wish to suggest that this is a good example of the appeal of the particular. For something is changed if we translate Denning's categorization of the facts into a statement of a general rule, as follows: 'A duty of care exists whenever a professional accountant prepares and puts before [a layman] accounts, knowing that he is going to be guided by them in making an investment and on the faith of these accounts he makes the investment and as a result he loses his money.' Analytically no change has been made in the course of translation. 'X happened and Y ought to happen' has become 'Whenever X happens, Y ought to happen.' But, whereas the particular statement seems unexceptionable, the general statement of the rule is likely to make lawyers uneasy. In this instance, the reason is clear. The formulation of the rule is too narrow: surely the rule, even in 1951, was not to be restricted to preparation of accounts by professional accountants for the purposes of investment. What of other professionals? Other forms of statement? Other purposes? Other kinds of loss? How far should the duty of care extend? In *Candler* Denning persuasively argued that there should be liability in this case, he suggested a general rationale for liability, and indicated some limits to the scope of the rule. But he left many details of the precise scope of the rule to be determined in future on a case-by-case basis. In an important sense, the general rule governing the situation was 'inexpressible' in 1951. For there

is a difference between saying, ‘This is a clear case of X’, and providing a general definition of X.⁸⁰

Miller v Jackson

Lord Denning’s dissenting judgment in *Candler v Crane Christmas* won almost universal acclaim and made legal history. A much later dissenting judgment, in *Miller v Jackson*, is almost as well known, but represented a partial defeat.⁸¹ The judgment is too long to reproduce here.

Some of its flavour and the reasons for its notoriety can be gleaned from the opening paragraph:

In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played for these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer has bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.⁸²

When I ask first-year students to read *Miller v Jackson* as an example of Lord Denning’s later writing, it stimulates a mixed reaction. Nearly everyone finds it enjoyable and interesting. Some find it persuasive, others think that it is ‘over the top’ or in some undefined way unjudge-like. Some see it as exhibiting prejudice or bias – in favour of cricket, against the Millers personally, or against property developers, or private property. When I point out that Lord Denning seems to have invented some facts (e.g. ‘the animals did not mind the cricket’), omitted relevant facts (e.g. the Millers had a child,⁸³ they were not alone in complaining), and

was guilty of exaggeration ('village cricket is the delight of everyone' – including the Millers?), most students agree that this is inappropriate behaviour for a judge. Would it be inappropriate for a barrister? Opinion tends to be divided. When I point out that in the course of the judgment he makes an elementary misuse of statistics,⁸⁴ they agree that invalid arguments are inappropriate for advocates as well as judges.

What of those who find it persuasive? The story as he tells it, does suggest that the Millers were being unreasonable, whereas the cricketers had in every respect behaved reasonably. Moreover, the Millers were newcomers who were trying to put a stop to a popular community activity that had been going on for seventy years ('newcomer' used five times; 'seventy years' six times – a clear example of 'theme');⁸⁵ 'thelema' is apparent too – is not the first paragraph alone calculated to win the sympathy of cricket-lovers, environmentalists, conservationists, ecologists, and lovers of tradition?⁸⁶

There are some similarities between *Miller v Jackson* and *Candler v Crane Christmas*: in each Lord Denning perceived a conflict between what he calls 'the merits' and outmoded precedent;⁸⁷ in each he used his statement of facts as a foundation for framing the issue, for winning sympathy for one side and for weakening the force of prior adverse precedents before dealing with them explicitly. In each case he pinpointed the elements which provided a rationale for what he believed to be the right result. Reliance, proximity, negligence in *Candler*, long-established community activity; reasonable steps taken to minimize risk to neighbours; private individual purchasing adjoining property with notice of the activity and of the risk. However, whereas his performance in *Candler* is masterly, there are some weaknesses in *Miller*. It is not so much that in *Miller* he too overtly assumed the mantle of advocate, as that his argument is spoiled by poor advocacy. This is not merely because of the lapses which are even less acceptable from a judge than an advocate: inventing facts; not mentioning an awkward fact;⁸⁸ misusing statistics; and giving an impression of being unfair to the opposition. Nor is the essential weakness an unsuccessful striving after literary effect (law students, I find, are amused but not impressed). Rather he fails to make the strongest possible argument. There are two crucial weaknesses: first, he fails to meet head-on the main argument of substance (as opposed to authority) for the other side; is it reasonable for people living next to a sports field, whether newcomers or not, to bear the risk of injury to person or damage to property caused by cricket balls? Cumming-Bruce LJ found a *via media* by awarding damages, but refusing an injunction to prevent the playing of cricket.⁸⁹ Secondly, Lord Denning became so immersed in the particulars of the Millers's story that he failed to step back sufficiently to satisfy Llewellyn's ideal of a Grand Style judge who categorizes the case in terms of the situation seen as a type in a way that suggests a solution. This could have been done along the following lines: 'This is a case of a long-established popular community activity which, despite all reasonable efforts to minimize risk of injury or damage to people and property on the adjoining land, cannot continue

without an element of such risk.’ One solution is to allow the activity to continue, but to make those involved bear the risk of damage.⁹⁰ This was in fact the final result.

Statement of facts

To conclude: the claim that ‘the statement of facts is the heart’ in arguments about questions of law is an example of an exaggerated statement that contains an important core of truth. It is exaggerated in two different ways: first, many statements of ‘the facts’ by advocates, as well as judges, are deliberately nonargumentative: that is to say that they set out to be ‘impartial’ or ‘unbiased’ or ‘dispassionate’. Most judgments aspire to such relative neutrality; in proceedings by way of case stated a court will attempt a formulation which fairly raises the issue to be resolved by a superior court; in some jurisdictions both sides will agree on a statement of the facts; even some of Lord Denning’s most colourful openings are designed to dramatize what he sees as a genuine dilemma rather than to lay the foundation for an argument justifying his decision one way or the other.⁹¹ Of course, a skilful reader may be able to identify hidden clues or unconscious biases in the language of a purportedly fair statement of the facts. But that is very different from claiming that such a narrative is the heart of the argument.

The precept is exaggerated in another respect: even when narrative statements are clearly part of an advocate’s argument or a judge’s justification, it is wholly exceptional for this to be the main part of the argument, let alone ‘the argument itself’. Legal argument typically consists of a mixture of authority reasons and substantive reasons.⁹² Even those theories of legal reasoning which discount the importance of pure fiat – of authority unglossed by interpretation that spills over into ‘substance’ – would treat as wholly exceptional a case in which the gist of the argument is that the facts speak for themselves. At the very least, explicit argumentation will seize on one or two elements in the story for emphasis as key points in the argument – for instance, as a ground for distinguishing this case from others or for proceeding by analogy or for grounding a general reason of principle or policy. The facts at most are a component of the argument.

The analysis of *Candler v Crane Christmas* and *Miller v Jackson* suggests a further point. For these are examples of a judge using narrative to ground an argument appealing to ‘substance’ in a context where arguments based on authority appear to support an opposite conclusion. The judge who justifies his decision entirely or mainly on ‘authority reasons’ is likely to have less need to use his statement of the facts as an important part of his argument. In short, narrative is more likely to be important for advocates and judges who are concerned to attack, undermine or reinterpret authority (whether precedent or statute) than for those who can invoke it in a more straightforward fashion. However, the precept contains an important core of truth. This goes much further than the mere claim that how the story of the particular case is told plays an important part in strengthening substantive reasons

in some arguments on questions of law in path-breaking or historic or particularly hard cases. Rather my suggestion is that narrative can play many different kinds of roles in legal arguments.

The three different interpretations of the precept illustrate three such roles, without in any way claiming to be exhaustive. A statement of the facts of a case may do little more than anticipate in concrete terms what will later be explicitly formulated as a general rule: 'The facts are X' precedes 'wherever X, then Y'. Or, a formulation of the facts may appeal to 'reason, sense or justice' in a way that is rhetorically more persuasive than overt general argument.⁹³ The formulation in *Candler* appealed in a way that could be rationalized at a general level, but it was a statement of a clear example falling within a less clear general rule. The formulation in *Miller v Jackson* involved some dubious appeals to 'fireside equities' – the particular plaintiffs were depicted as unattractive and unreasonable. In both of these cases narrative accounts of the facts of the particular case were being used, *inter alia*, as indirect means of weakening the force of adverse precedents. None of this is incompatible with the claim that focusing on the particular may also be a way of capturing 'the unexpressed' or 'the inexpressible'. *Candler* is an example of a common law judge in effect saying: 'This is clearly a case in which there should be a remedy. It is neither necessary nor desirable for me to delineate precisely the bounds of the general rule which should govern this and analogous kinds of situations.' A case-by-case method of proceeding has appealed to most common lawyers and some philosophers over the centuries.⁹⁴ Narratology draws attention to the significance of the way in which we describe or characterize particular particulars.

Disputed questions of fact: holism and atomism in arguments about evidence

The distinction between questions of law and questions of fact is problematic at the level of analysis; it has important consequences in legal practice. Contests about facts are governed by different procedures, involve different actors and, in contested jury trials, multiple audiences – for the respective functions of judge and jury are governed by quite elaborate rules. In our legal culture decisions on questions of law are generally required to be supported by public justifications, whereas there is no such general requirement for determinations of fact. Thus, lawyers have good reason for treating argumentation about questions of law and questions of fact as quite different kinds of operation. Conventional legal discourse adds a further twist: when lawyers talk of 'appellate cases' this generally implies that the issues are related to questions of law: when they talk of 'trial practice', it is assumed that typically what is at stake is a dispute about the facts.⁹⁵ Such talk sometimes masks a much more complex reality.

This artificial separation of two intimately related spheres of legal discourse is reflected in secondary treatments. The massive theoretical literature on 'legal reasoning' deals almost exclusively with reasoning about disputed questions of law,

sometimes without any acknowledgement that legal practice involves arguments about several other kinds of issues.⁹⁶ Discussions of reasoning about questions of fact – exemplified by recent debates about probabilities and proof – are largely dealt with in a separate body of literature, which belongs to a different intellectual tradition.⁹⁷ This artificial segregation has been maintained by a kind of fiction: just as arguments about questions of law proceed as if the facts are given, so arguments about questions of fact proceed as if the law is settled.

The complexities of the relations between narrative and argument are rather vividly exemplified in theorizing about judicial proof. Some of these can be illustrated by looking briefly at three apparently contrasting perspectives on the subject: Wigmore's account of the logic of proof,⁹⁸ a recent book entitled *Reconstructing Reality in the Courtroom*,⁹⁹ and the thesis, advanced by Abu Hareira and others, that many judgements about the evaluation of evidence are 'holistic' rather than 'atomistic' – and properly so.¹⁰⁰

The great American Evidence scholar, John Henry Wigmore, developed a 'Science of Judicial Proof as Given by Logic, Psychology and General Experience'. In his view there are two methods of organizing and analysing a mixed mass of evidence, 'such as is commonly presented in a judicial enquiry': the Narrative Method and the Chart Method.¹⁰¹ 'The Narrative Method rearranges all the evidential data under some scheme of logical sequence, narrating at each point the related evidential facts, at each fact noting the subordinate evidence on which it depends; concluding with a narrative summary.'¹⁰²

The Chart Method, which was Wigmore's own invention, involves restating the arguments about the evidence as a whole in the form of a list of propositions and depicting the relations between all the propositions in a single chart. The method is in essence an elaborate and rigorous form of rational reconstruction (or construction) of arguments in a manner which involves articulating every step of an argument and mapping the relations between all the parts.

Questions about the validity and the uses and limitations of Wigmore's Chart Method have been extensively canvassed elsewhere.¹⁰³ What is interesting in the present context is that Wigmore saw the Narrative and Chart Methods as alternatives, the former being in effect a more primitive and less rigorous version of the latter. 'The Narrative Method . . . is the simpler method, more readily used by the beginner, and more akin to the usual way of describing an evidence problem.'¹⁰⁴ The Chart Method, by contrast, 'may not commend itself to some types of mind. It is the only true and scientific method.'¹⁰⁵ Wigmore made two main claims for the Chart Method: it enables one to see an argument as a whole and, through a process of disciplined articulation, it makes it easier to spot fallacies, unwarranted jumps and other weaknesses in a complex argument.

Wigmore saw narrative as no more than a rather casual form of analysis, organization and presentation of evidence. Story-construction and story-telling had no significant role to play in his 'Science of Proof'. In sharp contrast, the most extensive modern account of the role of narrative in contested trials maintains

that 'The American criminal trial is organised around storytelling'.¹⁰⁶ Bennett and Feldman's *Reconstructing Reality in the Courtroom* explores in great detail and with some sophistication the theme of presenting and interpreting competing versions of reality in jury trials. The authors conducted a number of empirical studies about how cases are presented to and assessed by jurors in criminal trials in the United States. The underlying theory is based on the work of ethnomethodologists, such as Garfinkel, Cicourel, and Saks, and on the ideas of Kenneth Burke.

Bennett and Feldman argue that the advocates and jurors typically use stories to organize the otherwise disjointed bits of evidence that are presented to them. This helps them to select, interpret and assess what would otherwise be a confusing and unmanageable mass of data. 'Stories organize information in ways that help the listener to perform three interpretive functions': to locate the central action of the story; to construct inferences about the relationships among the elements surrounding the central action; and to test the story as a whole for 'internal consistency and descriptive adequacy or completeness'.¹⁰⁷ The authors suggest that Kenneth Burke's 'pentad' of elements of social action – scene, act, agent, agency, and purpose – provides an appropriate standard in this context: this general social frame of reference helps us to organize and evaluate the relations between the five elements in terms of their completeness and consistency.¹⁰⁸ Bennett and Feldman state their main conclusion as follows:

Judgments based on story construction are, in many important respects, unverifiable in terms of the reality of the situation that the story represents. Adjudicators judge the plausibility of a story according to certain structural relations among symbols in the story. Although documentary evidence may exist to support most symbolizations in a story, both the teller and the interpreter of a story *always* have some margin of control over the definition of certain key symbols. Therefore, stories are judged in terms of a combination of the documentary or 'empirical' warrants for symbols and the internal structural relations among the collection of symbols presented in the story. In other words, we judge stories according to a dual standard of 'did it happen that way?' and 'could it have happened that way?' In no case can 'empirical' standards alone produce a completely adequate judgment, and, there are cases in which the structural characteristics are far and away the critical elements in determining the truth of a story.¹⁰⁹

In this account stories perform several functions: they serve as aids to *selecting* from a superfluity of information and to *filling in gaps* in that information; they are a vehicle for introducing judgements of value; and, above all, they provide essential *frames of reference* for organizing, evaluating and interpreting evidence. In this view, empirical evidence and logical analysis have a secondary role as checks on completeness and consistency. To put the matter simply in terms of our lexicon: Wigmore subordinates story to theory in his account of the logic of proof; Bennett and Feldman appear to subordinate theory (and even evidence) to story in their account of reconstruction of reality in the courtroom by advocates and triers of fact.¹¹⁰

A similar tension between narrative and argument, story and theory, underlies the debate between ‘holists’ and ‘atomists’ in the theory of proof. In the Anglo-American tradition of discourse about evidence, by far the predominant view of what is involved in organizing and evaluating judicial evidence has been ‘atomistic’. That is to say, the construction and criticism of arguments about evidence, involves logical analysis of the relations between individuated propositions based on evidence. In the extensive debate between Baconians led by Jonathan Cohen, and Bayesians (and other ‘Pascalians’),¹¹¹ both sides have assumed that it is (in principle) possible and meaningful to combine judgements of probability (conjunction, corroboration, convergence), to construct ‘chains of inferences’ and to evaluate evidentiary propositions. What has been at issue has been questions as to what are the applicable criteria for making and evaluating judgements about probabilities in the context of judicial proof.

Recently, however, M. A. Abu Hareira suggested that much evaluation of evidence is, and is rightly, configurative or holistic. For example, in evaluating the probative force of a ‘mass of evidence’ we do not and should not proceed by analysing the mass into separate ‘items’ and giving each item an independent probative value. Rather we consider the mass as a whole, as a gestalt or configuration, and assess its total probative force or plausibility in a manner which defies analysis.¹¹²

A rather different version of ‘holism’ is summarized by Peter Tillers as follows:

For our own part, we are inclined to believe that the effort to state systematically and comprehensively the premises on which our inferences rest may produce serious distortions in the factfinding process, in part (but only in part) because such systematic statement obscures the complex mental processes that we actually employ and should employ to evaluate evidence. It is not true that we can say all we know, and the effort to say more than we are able to say is likely to diminish our knowledge and our ability to use it. In our daily lives, we confidently rely on innumerable premises and beliefs that we often cannot articulate or explain, but our inability to express these premises and beliefs does not necessarily make them illegitimate or unreliable. The same may be true of many beliefs relied upon in the assessment of evidence by a trier of fact in the courtroom.¹¹³

These brief accounts of some very different perspectives on judicial evidence illustrate how questions about the role of narrative and stories are of considerable significance in this context. They should also serve as a warning against oversimplification. It is beyond the scope of this essay to explore these issues in detail. But it is relevant to the argument in the next section to outline a position that suggests, *inter alia*, that these apparently different perspectives have rather more in common than appears on the surface. Each contains elements lacking in the others. The ‘holistic’ approaches of Tillers and Abu Hareira have yet to be presented in the form of rounded theories. Each, in different ways, usefully directs attention to the relevance of fundamental philosophical issues about conceptions of ‘rationality’ and the place of notions such as configuration and coherence in rational argument.

But we await a fully developed 'holistic' account of the role of analytical techniques in the evaluation of evidence.¹¹⁴

Wigmore's Chart Method is open to the criticism that, by failing to develop the notions of 'theory' and 'story', he gives the impression that his 'Chart Method' involves an almost mechanical application of ordinary principles of inductive logic. Anyone who tries to apply the method to a mass of evidence soon learns that Wigmore's theory provides almost no guidance in making *strategic* choices in constructing or criticizing a complex argument. He had a very crude view of narrative and he was surely mistaken in seeing 'the narrative method' as an alternative rather than as complementary to his method of analysis.

Bennett and Feldman's account has a converse weakness. They exaggerate the importance of stories in trials and underestimate the sophistication of good trial lawyers. Unfortunately they did not pay sufficient attention to the standard accounts by lawyers of how problems of selection, incompleteness and inconsistency are supposed to be tackled. In particular, by ignoring almost entirely such lawyers' notions as facts in issue, materiality, relevance, burdens of proof, presumptions and, most surprising of all, the advocate's notion of 'the theory of the case', they fail to reach a point where issue is squarely joined with standard legal accounts. Ignoring 'theory' leads them to exaggerate the role of stories in structuring understandings and decisions about disputed facts. Moreover, a Wigmorean can point out that general impressions are no substitute for meticulous detailed analysis in checking stories for consistency, coherence and completeness. Relying on stories to 'fill in gaps' could be interpreted as licensing just such unwarranted jumps and mere speculations that Wigmorean analysis can be used to expose. Finally, perhaps the best way of testing the plausibility of an argument or theory or story is to spell out in detail what precisely is being claimed. One of the best ways of exposing weaknesses in an argument is to articulate clearly what that argument is. This may be the main value of the Chart Method.¹¹⁵

All the theories mentioned here accept similar criteria of the credibility or plausibility of a theory or story: it must be compatible with uncontested or established particular facts; it must be internally consistent; it must be coherent; and it must be in conformity with what is variously referred to as 'general experience', 'the common course of events', 'commonsense generalizations' or 'the stock of knowledge' in a given society. There may be scope for disagreement about the meaning and role of 'coherence' in such evaluations, and about the relative importance of these various criteria. But all of the views considered are open to interpretation as non-sceptical, cognitivist theories that treat the enterprise as one of enquiring about the correspondence of some version of events with a notionally external reality.¹¹⁶ In this respect they may be out of tune with some of the more sceptical tendencies of post-modernist thought.¹¹⁷

In sketching a perspective that treats these seemingly different perspectives as to some extent convergent or complementary, I do not wish to give a false impression of consensus in this area. There are many unresolved questions and ample scope

for genuine disagreements and differences at many levels in the theory of judicial proof. Rather, I am suggesting that both narrative and explicit argument are almost bound to have a place in any prescriptive theory about arguing towards, arriving at, justifying and evaluating adjudicative decisions on disputed questions of fact. What precisely are the functions of narratives in this context and what are the proper relations between narrative and argument are open questions. My hunch is that the functions are diverse and the relations complex, but that they are closely analogous to those that we considered in connection with questions of law. My reasons for this are explored in the next section.

Making sense of the case-as-a-whole: law, fact, value and outcome

[W]e can say that both the history and the tapestry are in this respect like a law case: the lawyer knows that to prove his (or her) case he must not only demonstrate the truth or probability of certain propositions of fact; he must present to the judge or juror a way of looking at the case as a whole that will make sense; and it must ‘make sense’ not merely as a matter of factual likelihood, but as a predicate to judgment, as a basis for action. While a case can in a technical sense be refuted by disproving one element or another, in practice the lawyer knows that he must do more than that: he must offer the judge or juror an alternative place to stand, another way of making sense of the case as a whole. To do his job, that is, the lawyer must both engage in an accurate retelling of the facts and make his own claim for what they mean.

(James Boyd White, *Heracles’ Bow* ¹¹⁸)

So far I have followed legal convention by dealing separately with argumentation about questions of law, questions of fact and questions of disposition. The *basis* for the distinctions causes difficulty in legal practice as well as in legal theory, but the distinctions have important practical *consequences* in respect of allocation of functions between participants (e.g. judge and jury), rights of appeal, the doctrine of precedent and other matters.¹¹⁹ The question arises whether such sharp distinctions make sense from the perspective of narratology or whether they break down within some such concept as the story of a case as a whole. I propose to argue that these differentiations are not merely artificial technicalities within legal discourse; they are relevant in the present context for identifying some differences both within and between stories of (or about) cases. But there is no escaping traditional juristic puzzlement about relations between law, fact and value.

One of the most powerful images in legal history is Holmes’s Bad Man, an amoral citizen who is indifferent to the morality of his behaviour, the niceties of legal argument and procedure, or any questions about obligation to obey the law.¹²⁰ The Bad Man washes lawyers’ discourse in cynical acid in order to arrive at a clear answer to a single selfish question: ‘If I do this, what will happen to me?’ The Bad Man is concerned only with what the organs of the state will do to him in fact, if he is caught. For him, ‘the bottom line’ is the outcome of the case. Imagine, for example, a petty criminal with a record of previous convictions, who has been arrested and

charged with theft in circumstances in which the law is unclear, the evidence against him is problematic, and sentencing practice for this kind of offence is indeterminate or variable. He meets his lawyer and tells her that his main concern is to keep out of jail. From his perspective, decisions whether to contest on the facts or on the law or both or to petition for leniency via a guilty plea are secondary considerations which he may leave to his lawyer.

From the lawyer's point of view there are some tactical choices to be made. The prosecution case is: 'If X, then Y, then Z. This is a case of X, therefore Y, therefore Z.' The defence can contest X and/or Y and/or Z. What is involved in contesting on the facts, on the law or on sentence is very different in each instance, procedurally and in other ways. This is not just a matter of preparing and presenting three different kinds of argument, possibly to different audiences (judge, jury, magistrates, appellate court). One possibility might be a tacit or open plea-bargain: in exchange for not contesting X or Y, the prosecution (or the court) might agree to a non-custodial sentence, which is the lawyer's primary goal. In considering the case as a whole the lawyer might develop three very different kinds of theory: a theory of the law relating to the type of offence (Y); a theory about the evidence concerning the alleged incident (X); and a theory about mitigating circumstances (Z). While it would be unwise to have radical inconsistencies between these three possible lines of argument (for example to plead alibi in respect of X, and depression in connection with Z – 'my client was elsewhere at the time; he was depressed when he did it'),¹²¹ the three theories could in principle have little or no overlap; in practice they are more likely to fit together as three fully integrated components of a single whole. The three lines of argument are all means to the same end (securing an acquittal or, at least, avoiding a jail sentence) in a single case and can be used to support each other. From the standpoint of the Bad Man's lawyer the distinctions between questions of fact, questions of law and questions of sentence are of practical importance. However, even from her standpoint, these distinctions and the decisions they entail operate within the context of some notion of the case as a whole. Conversely, the Bad Man may not be the only participant who is primarily concerned with the outcome; the prosecutor, in deciding to prosecute,¹²² or the jury, in deciding whether to convict, may in practice base their decision on some global judgement about the Bad Man's deserts or the merits of the case rather than on a more differentiated approach that might restrict their role or the factors that they are meant to take into account. For example, the jury may return a 'perverse' or 'protest' verdict one way or the other because they think this law is an ass or that this prosecution should not have been brought or because they have taken against the accused.

How distinctions between law, fact, value and outcome break down in practice is vividly illustrated by Diana Trilling's account of the trial of Jean Harris, who was indicted for murdering her lover, Dr Herman Tarnower.¹²³ The case originally attracted attention because the accused was the headmistress of a well-known school near Washington DC (Madeira) and the victim was even more famous as the author of a best-seller, *The Complete Scarsdale Medical Diet*. It is likely to continue to

attract attention for many years to come, not least because many people believe that Mrs Harris was wrongly convicted. From the standpoint of the lawyer the case contained almost no questions of law. The crucial issue related to intention: did the evidence support beyond reasonable doubt the proposition that Jean Harris intentionally caused the death of Herman Tarnower? The prosecution argument was that Dr Tarnower's four wounds could only have resulted from deliberate shooting. Mrs Harris's story of the shooting was that she had come to Tarnower's house in order to have a last conversation with her lover before committing suicide in his garden; the conversation had gone badly wrong and Tarnower had been shot accidentally as he struggled to disarm her when she tried to shoot herself in his bedroom. There was no dispute that the pistol was Mrs Harris's. The issue of intent essentially turned on what happened in the space of less than five minutes in Tarnower's bedroom.

Diana Trilling suggests that Mrs Harris's lawyer, Joel Arnou, employed four different strategies in her defence: 'an old-fashioned compassionate defence; a defence based on social defence; what might by a stretch of definition be called an ideological defence (it dealt with Mrs Harris's dilemmas as a woman); and a defence based on physical evidence.'¹²⁴ Conspicuously absent was a psychiatric defence.¹²⁵

The theory behind each of these strategies might be rendered by a Wigmorean analyst as follows:

- 1 Mrs Harris deserves your sympathy, therefore she should be acquitted.
- 2 Mrs Harris is a fine lady, therefore she did not commit murder.
- 3 Dr Tarnower deserved all he got. Mrs Harris acted rightly on behalf of all women. Therefore, the killing was justified.¹²⁶
- 4 Dr Tarnower was accidentally shot in the course of a struggle in which he was trying to prevent Mrs Harris from committing suicide.

Diana Trilling claimed to be 'considerably estranged' by the first three strategies: 'I respected only the last of them.' Lawyers will recognize the first three as quite common courtroom tactics. They could point out that the second goes to Mrs Harris's credibility as a witness ('She is a good headmistress, renowned for her veracity; such people tell the truth; therefore you should believe her story').¹²⁷ However, they would agree that only (4) is legitimate and cogent as the main theory of the case. It is probably fair to say that this was the defence's theory and, in so far as the other strategies played a part, they were ancillary. However, over a week of the trial was taken up with a parade of 'character' witnesses from Mrs Harris's school who, on Trilling's interpretation, were testifying on behalf of the school more than for the accused: 'They have no public choice except to treat the shooting of Dr Tarnower as "the tragic accident" that Arnou calls it, a temporary block in the otherwise unimpeded onward and upward march of education.'¹²⁸

Perhaps even more significant is the lack of emphasis given in the closing speech for the defence to an account of the shooting itself: 'The story has taken no more than a minute or two, if that much, of Arnou's three-hour summation.'¹²⁹ On this

interpretation the great bulk of the defence was taken up with attempts to secure the theme in terms which Wigmorean analysis quickly reveals to be based on defective logic. But it also suggests that the core defence theory relating to the fatal few minutes was wrapped up in the context of a story spread over several years and presented in a way which mixed fact, value and speculation within rather generous conceptions of relevance. It is reported that the jury focused almost entirely on the immediate circumstances of the shooting and decided that not all the shots could have been fired by accident.¹³⁰

Some further complexities about the notions of 'case', 'case-as-a-whole', 'case-studies' and 'case-stories' can be illustrated by switching from the standpoint of the advocate to that of some outside observer, such as a student of law.¹³¹ It is a common criticism of academic law in the Anglo-American tradition that it suffers from 'appellate court-itis';¹³² law students and legal scholars pay too much attention to reports of appellate cases, whereas records and accounts of trials represent neglected materials of law study. In this context the distinction between 'leading cases' and '*causes célèbres*' is illuminating.¹³³ 'Leading cases' are precedents which have become landmarks in the development of legal doctrine either because they created or consolidated or gave authoritative approval to some resolution of a question of law of general significance. A few, for example, *Brown v Board of Education*¹³⁴ or *R v Dudley and Stephens*,¹³⁵ are well known outside the legal profession; but these are exceptional. Most such cases are considered 'leading' only within the specialized culture of law. Most *causes célèbres*, on the other hand, whether famous or notorious or otherwise 'celebrated', are known to a much wider audience; for example *Dreyfus* or *Sacco and Vanzetti* or *Bywaters and Thompson* or *Alger Hiss* or *Jean Harris*. Almost all leading cases at common law were decided by appellate courts and feature in the law reports. Many *causes célèbres* have involved dramatic, much-publicized trials; most have little or no 'legal' significance; it is a matter of contingency whether they feature at all in the law reports. When they do, the report tends to give a rather thin account of the story of the case.¹³⁶

Only a minority of cases featuring in the law reports count as leading cases. But, generally speaking in jurisdictions with selective law reporting, cases are selected for inclusion only if they have precedent value, that is they raised significant *questions of law*. The manner in which the reports are constructed, including the stories they tell, is determined in nearly every respect by this criterion of significance. *Candler v Crane Christmas* and *Miller v Jackson* are marginal examples of 'leading cases'. *Candler* paved the way for a later change in the law, but itself only reaffirmed the orthodox position that there was no duty of care for negligent misstatement. *Miller v Jackson* is notorious because of Denning's performance, but its significance as a precedent is rather limited: it did little more than confirm the nineteenth-century doctrine that the fact that the plaintiff came to the nuisance is no defence. The law reports give us 'the facts' of *Candler* and *Miller*, but they do not tell us the complete stories of particular disputes. We do not know from that source what happened to Mr Candler or the Millers or the Lintz Cricket Club after their cases were decided.

Nor, from the reports alone, can we tell what part these cases played in the story of the development of the law of negligence and nuisance.

Even on the most orthodox view of leading cases and other precedents, three different kinds of story are relevant to a reported case. The story of the original event or dispute which gave rise to the proceedings; the story of the litigation itself; and the story of the development of an area of law in which this precedent featured. We can rely on reports of cases *regularly* to tell only the first kind of story (the facts); even then the reported story may consist solely of allegations that have never been established by evidence – it is trite that the most famous of all of our leading cases, *Donoghue v Stevenson*, may be a monument to a mythical snail.¹³⁷ Yet, it is rather exceptional for a law report to be criticized for being incomplete. Judged by orthodox criteria of significance, law reports generally tell us all we need to know about a particular ‘case’.¹³⁸

This last point should prompt us to take a further look at the notion of ‘a case as a whole’. An adequate report of a ‘case’ in the sense of a legally significant precedent does not need to give a full account of the proceedings nor of the dispute; it often does not even tell us the end of the story of the episode between the parties. Yet, from the point of view of legal significance, what is reported is the whole ‘case’. What constitutes ‘a case as a whole’, even in a loose sense, depends on one’s point of view and why the case is considered significant.

Some lawyers may think that this is belabouring the obvious. But a recent trend in legal scholarship suggests that the implications of this are not as obvious as they should be. The last decade has seen the publication of a number of notable contextual studies of leading cases. A conspicuous example is Brian Simpson’s *Cannibalism and the Common Law*.¹³⁹ Such studies explore the historical context of the case in great detail and, in most instances, examine its aftermath and impact. Typically they cover all three kinds of story mentioned above: the story of the original facts; the story of the legal proceedings; and the story of the aftermath, including the legal aftermath.

They tend to make for good reading and they often change one’s perception of the original case. Almost invariably they make the point that leading cases tend to become abstracted from their original historical context and take on a life of their own. Yet, as I have argued elsewhere, the significance of such studies is often unclear.¹⁴⁰ The reason is simple: leading cases are leading because they are legally significant. In-depth studies of the background of such cases, however scholarly, entertaining or illuminating they may be as slices of legal life, may add very little to our understanding of the general doctrine they produced. Their significance lies elsewhere and is sometimes obscure or unfocused. Law reports are centripetal; contextual studies are often centrifugal.

Contextual studies of leading cases are no different from other case-studies in lacking settled criteria of significance.¹⁴¹ Indeed, it is leading cases and precedents which are exceptional in this respect. There are, of course, many different kinds of reasons why *causes célèbres* may be celebrated. They may have involved famous people or sensational events or dramatic trials or politically significant issues. Many

retain their interest mainly as unsolved mystery stories. Some are significant as unequivocal or ambiguous symbolic events. America's leading *cause célèbre*, the *Sacco-Vanzetti* case, provides a striking example.¹⁴² It originally attracted attention as a potential miscarriage of justice.

Nicola Sacco and Bartolomeo Vanzetti, both Italian immigrant workers, were accused of murdering two men during a payroll robbery in South Braintree, Massachusetts, in August 1920. They were tried and convicted in April 1921. After a lengthy legal and political campaign to save them, they were eventually executed in August, 1927.

Few *causes célèbres* have generated such an extensive literature. The full transcript of the trial and subsequent proceedings has been published in several volumes. Lawyers involved in the case and prominent legal scholars, including Felix Frankfurter, John Henry Wigmore, Edmund Morgan, and Karl Llewellyn published studies, including detailed analyses of the evidence. Many prominent figures were involved in the international protest. The case became the subject of so many novels, plays and poems that it prompted the comment that it was the only major literary event in the United States between two world wars.¹⁴³

What is the legal, political and literary significance of the story of Sacco and Vanzetti? It has never been seriously doubted that a payroll robbery and murder took place in South Braintree on 15 August 1920. The central issue in the trial was a single question of fact concerning identity: were Sacco and Vanzetti (or one of them) involved in the crime? There were no substantial questions of law in the case, but many questions have been raised about the fairness of the proceedings, including some concerning admissibility of evidence. Legal opinion is split on these issues: 'The trial judge, the trial jury, the Supreme Judicial Court, and the Advisory Committee each and all decided every vital issue against [the accused].'¹⁴⁴ Most, but by no means all, legal commentators maintain that the trial involved serious violations of due process and that such evidence as there was linking the accused to the crime did not satisfy the standard of proof beyond reasonable doubt. There is still scope for disagreement about evaluation of the evidence relevant to the question whether as a matter of historical fact either or both were participants in the hold-up. From an orthodox legal point of view this does not differentiate the case from many other alleged miscarriages of justice. Karl Llewellyn, who campaigned actively on behalf of Sacco and Vanzetti, argued that the case was important not because it was unique, but because it was typical. It revealed serious institutional deficiencies in the administration of criminal justice in the United States.¹⁴⁵

That is not why the story of Sacco and Vanzetti is 'celebrated'. Nor is it generally regarded as just another example of a mystery story. Rather it was treated (somewhat belatedly) and has continued to be perceived as a major political event. Sacco and Vanzetti became symbols of injustice. The significance of their story has, not surprisingly, been variously interpreted.¹⁴⁶ It has been taken to represent capitalist oppression of the working class; the non-acceptance of immigrants in American society; the persecution of political radicals; and conspiracy and corruption in 'the

establishment', or just blind prejudice. In many commentaries, and in nearly all fictional accounts, it is assumed that this is a clear example of wrongful conviction of individuals who were innocent in fact as well as in law. Such interpretations often ignore distinctions between three kinds of miscarriage of justice in the courts: a person may be wrongly convicted because the court made a mistake of fact (in this case, that they got the wrong persons); or, whether or not as a matter of historical fact the accused did commit the crime, there was insufficient evidence to justify conviction according to the criminal standard of proof; or, whether or not the accused did commit the crime, the procedures followed were unfair. Many 'non-legal' interpretations of the *Sacco-Vanzetti* case tend to ignore these distinctions or treat them as trivial or irrelevant. On this view the important fact is that Sacco and Vanzetti were wrongly convicted and wrongly executed. The point of their story is the outcome: whether or not that outcome is attributable to factual error or insufficient evidence or procedural irregularity or other technical niceties or a combination of these is beside the point. They were victims of a great injustice.

This view needs to be taken seriously by lawyers as well as others. For the reasons for treating this case as important seem to be independent of such lawyers' distinctions. Surely, what matters is who they were (Italian, working-class, anarchists) and what happened to them (wrongful conviction and execution). Some of what is at stake here in this difference of views may be illuminated by considering Vanzetti's letters.

Bartolomeo Vanzetti's letters are among the classics of prison literature.¹⁴⁷ Written in touchingly fractured English, they have moved many readers with their combination of constant reiteration of his innocence with simplicity, concern for others, political awareness, and dignified acceptance of death. If one reads them on the assumption, or indeed as evidence, of Vanzetti's complete innocence, they constitute a powerful human document. If, however, one tries to read them on the contrary assumption that he was in fact one of the robbers, does this transform the collection into a work of monstrous hypocrisy? I do not think so. It could be that Vanzetti had come to believe in his own innocence and that this is a pathetic or tragic example of self-delusion. Or one can discount the protestations of innocence – perhaps as tactful, perhaps even necessary, white lies – and still respect his courage and dignity and concern for others. Or, is it perhaps the testament of a committed political activist who, well aware of his significance as a symbol of injustice, is consciously making his courageous last contribution to the cause? Opinions may differ on the plausibility of these different readings. But, I would suggest, the brute question of fact of his involvement in the hold-up is a central element in almost any interpretation of the story of Bartolomeo Vanzetti. Whether the 'point' of the story concerns the workings of American courts or political persecution of aliens and radicals or just an extraordinary person, it makes a qualitative difference whether the story proceeds on the basis that he was not in fact at South Braintree or that he was wrongly convicted because there was a reasonable doubt on the evidence or because unfair procedures were followed or because there were technical

irregularities in the proceedings. Injustice established as a matter of historical fact is qualitatively different from miscarriages of justice that are solely deviations from the law's own standards.¹⁴⁸

Jurisprudence and narratology

Jurisprudence, viewed as the theoretical part of law as a discipline, is centrally concerned with the nature of legal discourses and their underlying assumptions. Legal discourses are of many kinds. This essay has principally been concerned with two specific kinds: 'arguments' by advocates and judges in court on questions of law and questions of fact. The conceptual difficulties associated with distinctions between 'law', 'fact' and 'value' are much debated in jurisprudence. On one view, with which I have some sympathy, arguments about questions of fact and questions of law are both species of practical reasoning with similar, but not identical, criteria of validity, cogency and appropriateness. However, the distinction between 'questions of fact' and 'questions of law' has very significant consequences for the discourse of advocates. How an issue is classified affects who addresses whom in what arena according to what procedural conventions and practices.

The modes of discourse in argumentation about questions of law and questions of fact in court are accordingly very different. Nevertheless there are some important structural and other similarities. In this essay I have tried to illustrate some of the variety of functions that narrative can play in both types of discourse and to a lesser extent in pleas in mitigation. It should not be a matter of surprise that in law, as in other parts of our culture, there are recurrent tensions between general and particular, fact and value, logic and rhetoric, and reason and intuition or imagination.¹⁴⁹ Nor should it come as a surprise that narrative plays a variety of roles in legal discourse or that in advocacy the relations between story-telling and rational argumentation are problematic. What may be more surprising to the outsider is to find that legal theory has almost entirely forgotten its roots in classical rhetoric; that theorizing about arguments on questions of law, questions of fact and sentencing occupy three largely disconnected bodies of literature; and that, in recent years, contacts between literary and legal theory have largely been confined to concern with the first kind of question. In considering what jurisprudence and narratology may currently have to offer each other in the Anglo-American context during the next few years, all of these factors are relevant.

The first message of the essay has been a warning of complexity. Not only are there many different contexts and kinds of legal discourses, but the specific context of advocacy – litigation – is itself extremely complex. Proceedings in court are of many different kinds and any particular example of courtroom discourse by lawyer, or judge or other participant, needs to be set in the context of the total process – the story of that particular piece of litigation. We have seen how even orthodox readings of the most familiar kind of legal text, 'cases' in the law reports, typically require differentiation of at least three kinds of stories: the story that gave rise to

the proceedings ('the facts'); the story of the litigation (the proceedings); and the story of the development of the law which gives the case its significance (the case as precedent). Yet, as every lawyer knows, but we sometimes forget, law reports are highly selective, incomplete accounts of atypical cases, selected because they were 'hard', that is there was a doubt about the law. Quite often one does not learn of the final outcome of the proceedings, that is the resolution of the story of that particular litigation. The texts on which we draw for examples of arguments about disputed facts are more variable, less accessible, and even less likely to be typical of contested trials than the standard law report. Narratologists, beware!

The second lesson of this preliminary exploration is that it is easy to exaggerate the importance of narrative (*stricto sensu*) in legal argument. It plays important and multiple roles, sometimes in the foreground, sometimes as background. But some claims made for it are overstated: 'The statement of facts is the heart'; 'Juries choose between competing stories'; 'the central act of the legal mind . . . is the conversion of the material of life . . . into a story that will claim to tell the truth in legal terms' – these are all overstatements that exaggerate the roles of story-telling in legal argument, let alone other legal discourses. It is probably fair to say that 'story' and related notions have been neglected in legal theory. In so far as this is so, 'narratology' has something potentially significant to contribute – not least in stimulating lawyers to re-examine their conceptions of rationality. But it is unlikely that Law will become part of Narratology's Empire.

Thirdly, this essay has been almost entirely concerned with prescriptive theories of advocacy and argumentation. The focus has been on issues relating to what constitute legitimate, valid, cogent and persuasive modes of reasoning on disputed questions of law and fact. We have only touched incidentally on modes of persuasion in advocacy that may be perceived as clearly or arguably illegitimate or irrational. Narrative is no doubt sometimes used 'to sneak in' irrelevant or improper considerations, to conceal or divert attention from gaps or weaknesses in an argument, and in many other ways. Here, narratology may help to remind jurists of important issues about the ethics of argumentation. Such issues were central concerns of classical rhetoric, but have been relatively neglected in Anglo-American jurisprudence at least from this kind of perspective. These are just some possible lines of enquiry within normative jurisprudence.

Legal theorizing should not be and is not confined to normative questions. It is also concerned with understanding and interpreting law in the real world. In recent years actual examples of legal texts of different kinds have been subjected to scrutiny from a variety of perspectives. Ethnomethodologists, phenomenologists, semiologists, structuralists of many fashions, deconstructionists, literary theorists, hermeneuticists, and other inelegantly labelled academic entrepreneurs have exploited the rich heritage of legal texts with many fanfares and mixed success.

This essay is one of a series of explorations of the place of narrative in general culture. Can one expect to find something particularly illuminating or distinctive from the study of legal texts? Apart from the dual warnings about diversity and

complexity, I have dropped a few hints about my own tastes. I happen to think that much of legal life and legal discourse is a part of general culture, far less distinctive, peculiar or unfamiliar to 'laymen' than is often suggested. So, for many purposes, legal texts can be treated as just one standard kind of cultural artefact which happens to be at hand. For example, just as social historians cull legal records as standard, relatively accessible sources of evidence about this or that aspect of social life, so one can find in the law reports an extraordinarily rich, well-documented anthology of 'real life' stories which can be analysed for all sorts of reasons unconnected with why they were originally preserved, constructed and published. However, if I had to settle for one reason why narrative in legal discourse has a special significance in culture, I would focus on the key factors of power, decision, publicity and argumentation. In no other sphere of social life are there to be found in such abundance practical decisions by powerful officials that have had to be argued for and justified in public and recorded in texts. Whether those texts are statutes, law reform documents, records and reports of trials, law reports or formal agreements, they share the elements of power, decision, recording and, to a lesser extent, public accountability and justification. Such legal texts are not unique in having these characteristics – witness for example election manifestos, (non-legislative) parliamentary debates, company reports – but as a body of literature they are unrivalled in their extent, detail and availability. Narratology seems to me to offer a fruitful lens for studying such texts; and, if legal narratology develops as a flourishing sub-discipline, it may even help to reunite legal theory with rhetoric. But that is another story.

1 Millar (1957), 14–15.

2 J. B. White (1973), 859. Compare the claim of Fredric Jameson (1980): '[t]he allinforming process of narrative [is] the central function or instance of the human mind', cited by Nash (1987), 2.

3 The main exception is the 'New Rhetoric' of Chaim Perelman and his associates. See especially Perelman and Olbrechts-Tyteca (1971) and, more recently, Goodrich (1986), (1987), [Scallen (1995), (2003); Feteris (1999a)], Bernard Jackson (1985), (1988a) and others working in legal semiotics.

4 A notable example is Lord Diplock's rebuke, in criticizing Lord Denning's arguments in his dissenting judgment in *Gouriet v Union of Post Office Workers*, as revealing 'some confusion and an unaccustomed degree of rhetoric', [1972] AC 1027, 1054.

5 J. B. White (1973), 859; cf. Bennett and Feldman (1981).

6 Discussed, Twining (1984a), 264–5.

7 Twining (1984a), esp. 299.

8 In canvassing the literature of advocacy I have gained an impression of fragmentation rather than total neglect. The scene is the not unfamiliar one of bodies of literature talking past each other. In considering the role of narrative in arguments about disputed questions of law I have learned a great deal from the insights of Karl Llewellyn and James Boyd White. Despite a sense that White sometimes overstates his case (rhetorical exaggeration?), I am generally in sympathy with his impressive efforts to develop a humanistic rhetoric of law.

- 9 Non-lawyers should be warned that the great bulk of the jurisprudential literature on reasoning about questions of law (e.g. McCormick, 1978) and on questions of facts (e.g. Wigmore (1937)) is normative rather than empirical, and tends to be highly selective in its use of examples. See further, B. Jackson (1988a), ch. 1.
- 10 I am here postulating that canons of ethics and the status of ‘officer of the court’ operate as side-constraints on this role of advocates in common law litigation to represent the interests of their clients. Although not unproblematic, the primary role is more easily grasped than the perennially controversial roles of the judge and jury. On the heuristic value of adopting the standpoint of advocate as a device for differentiating puzzlements about role from other concerns see Twining and Miers (1982) 286–91 [1999 edn, 169–75].
- 11 See generally Zuckerman (1986a) and Jackson, Ockleton, White, and Summers in Twining (ed.) (1983).
- 12 Ehrenzweig (1971).
- 13 This section draws on Du Cann (1964), Evans (1983), Jeans (1975), Mauet (1980), Rumsey (ed.) (1986), and Stryker (1954). These are, of course, mainly examples of discourse *about* advocacy.
- 14 See below, 311–18 [and *Analysis* (2005) at 118–20, 153–8].
- 15 A reconstruction of the defence theory in the case of *Jean Harris*, see below 313–14.
- 16 A reconstruction of a possible theory of the case for the plaintiff in *Candler v Crane Christmas* [1951] 1 KB 164, discussed below, 300–3.
- 17 A reconstruction of a possible theory of the case for the defence in *Miller v Jackson* [1977] QB 966, discussed below, 300–5.
- 18 Mauet (1980), 8. Recent research in Ontario suggests that manuals of advocacy and advocacy training have tended to underplay the importance of developing strategic plans as a basis for effective advocacy (N. Gold in Gold et al. (1989), 323).
- 19 See below 294–6. Typically, determinations of X and Y take an all-or-nothing form, whereas (absent a fixed penalty or tariff) the appropriate sentence has to be selected from a range of possibilities. Orthodox theory recognizes deviations from the paradigm. For example, mixed questions of fact and law; judicial discretion in respect of application of a rule (e.g. discretion to exclude evidence) or of remedies (e.g. equitable remedies); interlocutory questions of procedure and so on.
- 20 These are different *usages* of ‘story’ commonly found in lawyers’ talk. There are, of course, many *kinds* of stories, as the term is used in this essay. In the present context, it is especially important to distinguish between several types. First, stories about the events, or rather the alleged events, that gave rise to the proceedings (‘the facts of the case’). Secondly, the story of the legal proceedings which may, of course, be one phase of some longer process, such as a long drawn-out dispute or feud. Thirdly, a party’s or witness’s version of events of which they have first-hand knowledge. There is an extensive literature about the ways in which our adversarial system of procedure can prevent or make it difficult for witnesses to tell ‘their story’ in their own way and in their own words (see below, n. 40). Fourthly, there are stories about the development of the legal doctrine applicable to the case. Such ‘legal stories’ sometimes form part of an argument by an advocate or judge in the case. (See e.g. Lord Denning in *Central*

London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130.) Stories can also be told *about* the case, for example, explaining its significance as a precedent by setting it in the context of an account of the historical development of an area of law. Finally, the 'life-story' of a central participant, in more or less abbreviated form, may be treated as relevant in one phase of a legal proceeding (e.g. sentencing), but may be treated as irrelevant or inadmissible at a different stage (for example, there are complex rules governing the admissibility of evidence of character or disposition, including prior convictions, in relation to determination of guilt, but not of sentence). That this is not a comprehensive list of lawyers' stories can be easily seen by consulting the *Oxford Book of Legal Anecdotes* or *Great Legal Disasters* or any legal biography or collection of *causes célèbres*. In lawyers' clubland one can expect to hear a fairly predictable mix of war stories, anecdotes, jokes, gossip, legends, tales and myths. We are here mainly concerned with narrative accounts of the facts of a case and the use of narrative in legal argument ('legal stories', types 1–4).

- 21 Ricoeur (1981), 278–9.
- 22 Forster (1949), 82–3, discussed Rimmon-Kennan (1983), 16–19. Forster defines 'plot' explicitly in terms of causality; I have modified this in order to include narrations that are arguably totalities independently of notions of 'cause': in the third example, causation plays a part but is, arguably, not the 'point' of the story. Some writers, e.g. James Boyd White (1985), Kim Lane Schepel (1988) and Italo Calvino (1981), appear to maintain that all stories need a resolution or ending. While I am sympathetic to this view I have not included resolution as a necessary element in my conception of a story because in legal contexts there seem to be counter-examples: e.g. the facts of a case may raise an unresolved question, or an account of the development of a doctrine through a series of precedents may be presented as 'the story so far'. In both instances the telling of the story has a point, but not a resolution, as I understand that term.
- 23 'Narrative' is sometimes used more broadly to include accounts that are not stories. This paper is concerned with stories and story-telling in legal discourse; much of what is said here may also be true of other kinds of accounts.
- 24 *Trial of George Joseph Smith*, Watson (ed.) (1915), 261–2; cf. Bodkin's opening speech, 73–4.
- 25 See above 290.
- 26 Milsom (1967), 5–6. This probably over-simplifies the functions and discourses of *narratores*.
- 27 Below, 311–18. Lawyers use the word 'case' in several different senses: one can bring a case (action), read a case (report), argue a case (argument), state a case (problem), win a case (action), or rely on a case (precedent). We have been considering reports of cases and case-studies. Let us call the genus 'case-accounts'. Such accounts share several features with stories: they have a unity; and they are supposed to have a point or meaning or significance. To say of a story or a case-account that it is pointless or meaningless or insignificant is generally to criticize it. Many case-accounts lack the time element of stories – they may concern situations or states of affairs; they may differ from stories in containing non-narrative materials – for example, arguments or diagnosis or

solutions. But the elements of construction, configuration and of particularity linked to general significance make the analogy a close one. Stories and case-accounts *impose* beginnings and endings and resolutions and meanings on situations and events (but see above, n. 22). Within legal discourse, especially in the common law, different kinds of case accounts play a prominent and varied role. For a different perspective on the concept of ‘case’ as a unit of discourse see below, ch. 13.

- 28 The use of stereotyped or mechanical or reconstructive stories, in e.g. traffic courts, may serve to simplify and speed up the process through ‘typification’. See Brickley and Miller (1975), 693; Carlen (1976).
- 29 Even in cases of strict liability, an account of how the situation came about may be relevant, for example, to ground a specific defence or as a mitigating or aggravating factor. It is, however, important to bear in mind that while attribution of legal responsibility normally relates to acts and omissions of identified legal persons, this is not always the case.
- 30 E.g. Patrick Bennett QC in Rumsey (1986); K. Evans (1983).
- 31 On whether lawyers have a peculiar notion of relevance, see Holdcroft, and Zuckerman in Twining (ed.) (1983).
- 32 Bennett in Rumsey (1986), 3.
- 33 K. Evans (1983), 25.
- 34 Ibid., 36.
- 35 Ibid., 37.
- 36 Ibid., 43.
- 37 Ibid., 79.
- 38 The Hon. Charles L. Weltner in Rumsey (1986), 6. The primary meaning of *θέλημα* (thelema) in classical Greek is ‘will’; compare *θέλω* (thelgo) ‘to stroke with magic power, to charm, enchant. Spell-bind, Lat. mulceo: to cheat, cozen’, Liddell and Scott, *Greek Lexicon* (abridged).
- 39 Shapland (1981).
- 40 E.g. Danet (1980), 514–19; O’Barr (1982), 76–83, 137–48.
- 41 Shapland (1981).
- 42 E.g. K. Evans (1983), Du Cann (1964). American manuals tend to place more emphasis on preparation. The distinction between ‘argument’ and ‘presentation’ is related to, but does not quite correspond with, Aristotle’s categories of logos, pathos and ethos. An ‘argument’ belongs to the sphere of logic in a broad sense; its validity and cogency are to be judged by whatever are achieved by the applicable principles of correct reasoning. Presentation refers to the method, style and techniques of communicating with an audience or audiences and, in relation to persuasion, is judged by its effectiveness in fact. Many of the precepts of advocacy relating to presentation, such as the importance of arousing and maintaining attention, of winning trust and of ensuring that one is understood are quite compatible with notions of ‘rational persuasion’. To what extent such matters as thelema, themes, ethos and pathos belong to the sphere of persuasion by non-rational means is central to the theory of advocacy. See generally, J. B. White (1973), 810–21.
- 43 The concept of legitimacy is, of course problematic: see further below 296–300.

- 44 E.g. Bennett and Feldman (1981), Preface and ch. 1, Hastie et al. (1983) [Pennington and Hastie (1991)].
- 45 J. W. Davis (1940), (1953), 181. Steven Winter has suggested to me the hypothesis that the 'best' advocates are more inclined to follow Davis's dictum in higher than lower courts. This corresponds with the notion of 'typification' as a means of speeding up the process in lower courts, see above, n. 28.
- 46 J. W. Davis (1940, 1953); cf. Paterson (1982), 52–65.
- 47 Llewellyn (1962), 341–2; cf. (1960), 238. The passage immediately preceding the quotation reads:
- [The] real and vital central job is to satisfy the court that sense and decency and justice require (a) the rule which you contend for in this *type* of situation; and (b) the result that you contend for, as between these parties. Your whole case, on law and facts, must make *sense*, must appeal as being *obvious* sense, inescapable sense, sense in simple terms of life and justice. If that is done a technically sound case on the law then gets rid of all further difficulty: it shows the court that its duty to the Law not only does not conflict with its duty to Justice but urges along the exact same line.
- The great change during these last few years in the approach of the best advocates lies here. As little as twenty or even ten years ago [i.e. before 1945], leading appellate advocates were still apologizing in private for that necessity of their profession that they termed 'atmosphere' . . . It is no longer a question of 'introducing atmosphere'. It is now a question of making the facts talk. For of course it is the facts, not the advocate's expressed opinions, which must do the talking. The court is interested not in listening to a lawyer rant, but in seeing or discovering, from and in the facts, where sense and justice lie. (*ibid.*, at 341)
- On sense, wisdom and justice see Llewellyn (1960), 59–61.
- 48 E.g. Llewellyn (1960), 84–6, 256–60.
- 49 E.g. Llewellyn (1960), 126–8, 238.
- 50 Twining (1973a), 261–3.
- 51 See below, n. 88.
- 52 One must, of course, beware of what Llewellyn called 'the threat of the available' (1962), 82–3. In this context, it is worth repeating that the examples used in this essay are not meant to be representative of day-to-day practice, in which, one suspects, explicit storytelling plays a more limited role than these illustrations suggest. Most lawyers and judges are more formalistic than Lord Denning and Karl Llewellyn.
- 53 See further, Twining (1973a).
- 54 Llewellyn (1960), 29.
- 55 *Ibid.*, note.
- 56 HTDTWR (1982), ch. 7. [(1999), ch.10.]
- 57 Llewellyn (1960), 238; Twining (1973a), 216–27, 257–64.
- 58 Llewellyn (1960), 238.
- 59 *Ibid.*, 59–61, 426–9.
- 60 *Ibid.*, 60–1, 238, discussed Twining (1973a), 216–27, 262–4.
- 61 Llewellyn (1960).

- 62 Discussed Gottlieb (1968), chs. 3–4.
- 63 Lopez (1984), 32–3. This article illuminatingly explores stories and story-telling in order to illuminate ‘the connections between how we perceive the world, how we persuade others, and how we make difficult choices . . .’ in problem-solving by lawyers seen as instances of human problem-solving (10, 2). The article centres on an example in which lawyers’ sharp distinctions between questions of fact, law and disposition do not apply. The thrust of this paper is very much in sympathy with Lopez’s analysis.
- 64 Ibid., 34.
- 65 Llewellyn (1960), 365, discussed Twining (1973a), 227–9.
- 66 J. B. White (1973), 863–5; cf. J. B. White (1985), ch. 2 and 118–19. This idea may find some confirmation in psychological research on ‘telling more than we can know’, e.g. Nisbett and Wilson (1977).
- 67 J. B. White (1973), (1984), (1985). Some indication of White’s perspective – he would not accept it as a definition – is expressed in this dictum: ‘[L]aw can be best understood as a set of literary practices that at once create new possibilities for meaning and action in life and constitute human communities in distinctive ways’ (‘The Judicial Opinion and the Poem: Ways of Reading, Ways of Life’ (1985), 107). For an excellent critique of White’s views see Sherwin (1988).
- 68 Twining (1973a). There is now an extensive literature on Llewellyn’s concept of ‘situation sense’. One of the best discussions is Whitman (1987).
- 69 See especially, Jowell and McAuslan (1984), esp. 17–19, Robson and Watchman (1981), Harvey (1986). Lord Denning’s own discussions of his style are also revealing, e.g. *The Family Story* (1981), 206–20. It is important to emphasize that the two cases discussed here are among the most striking of Lord Denning’s judgments, and so cannot be taken as representative judgments of his output as a whole: still less can Lord Denning as story-teller be treated as typical of the style of English judges. See further n. 52.
- 70 [1951] 2 KB 164, [1951] 1 All ER 426.
- 71 *Hedley Byrne and Co. Ltd v Heller and Partners Ltd* [1964] AC 465. Lord Denning has denied that his judgment was written to persuade the House of Lords to overrule prior precedents on negligent misstatement (interview, July 1987). Nevertheless he is generally given credit for having persuaded them (e.g. Atiyah and Waddams, in Jowell and McAuslan (1984), 57, 468).
- 72 [1951] 1 All ER at 428.
- 73 In the *Law Reports* the first paragraph is omitted. The paragraph reads:
 In September 1946, the plaintiff invested £2,000 in a company called Trevanance Mines, Ltd. (which I will call ‘the company’), and he has lost it all because the company turned out to be a failure. He now brings this action against the defendants, who are the company’s accountants and auditors, claiming that he was induced to invest the money because of erroneous accounts put before him by them and on the faith of which he invested his money. The judge had found that the accounts were ‘defective and deficient’ and presented a position of the company which was ‘wholly contrary to the actual position’, that the accountants were ‘in fact extremely careless in the preparation of the accounts’, and that the damage suffered by the

- plaintiff was 'plain', but, nevertheless, the judge dismissed his claim because, in his opinion, there was no duty of care owed by the accountants to the plaintiff.
- On the phenomenon of judges restating the facts (or doctrine), using different words see Llewellyn (1951), 47; Twining (1973a), 235.
- 74 [1951] 1 All ER at 428.
- 75 Ibid.
- 76 Atiyah (1984), 57.
- 77 The famous passage on 'timorous souls' and 'bold spirits' is at 432; Asquith LJ's riposte is at 442.
- 78 Atiyah (1984), 57.
- 79 Atiyah (1984), 57.
- 80 cf. John Wisdom's account of 'case-by-case procedure' in his Virginia Lectures, discussed by D. C. Yaldon-Thomson in Bamrough (ed.) (1974), ch. 3.
- 81 *Miller v Jackson* [1977] 3 All ER 340. This passage is discussed by Bernard Jackson (1988a), 93–7, where he glosses but does not undermine my interpretation.
- 82 [1977] 3 All ER at 340–1.
- 83 [1977] 3 All ER at 346 (per Geoffrey Lane J), 350 (per Cumming-Bruce LJ).
- 84 'Despite these measures, a few balls did get over. The club made a tally of all the sixes hit during the seasons of 1975 and 1976. In 1975 there were 2,221 overs, that is, 13,326 balls bowled. Of them there were 120 sixes hit on all sides of the ground. Of these only six went over the high protective fence and into this housing estate. In 1976 there were 2,616 overs, that is 15,696 balls. Of them there were 160 six hits. Of these only nine went over the high protective fence and into this housing estate' (at 341). Later he states: 'He could not complain if a batsman hit a six out of the ground, and by a million to one chance, it struck a cow or even the farmer himself' (at 344). Innumerate lawyers and narratologists are invited to spot the fallacy.
- 85 At 340–5. In an interview in July 1987 (see above 282–3) Lord Denning indicated that at the time there was a lot of sympathy for the Millers and that he was concerned to right the balance. He graciously conceded that if his audience feels that he has overstated his case, then this is not good advocacy.
- 86 See B. Jackson (1988a), 94–7 for a different interpretation.
- 87 In *Candler* the main, but not the only, adverse precedent was *Le Lievre v Gould* [1893] 1 QB 491; in *Miller v Jackson* it was *Sturges v Bridgman* (1879) 11 Ch D 852.
- 88 J. B. White (1985), 116, says: 'An opinion that simply adopted one side's brief would not be worthy of the name.' This, however, underestimates the notion that the most persuasive advocate is the one who confronts the difficulties and surmounts them. Cf Llewellyn (1960), 241–5.
- 89 [1977] 3 All ER at 351.
- 90 Ibid.
- 91 E.g. *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 1 All ER 332, CA, 9.
- 92 Summers (1978a), Fuller (1946).
- 93 Cf. Lord Atkin (see Millar (1957)); B. Jackson (1988a) 94–7.
- 94 See above, n. 80.

- 95 See e.g. Mauet (1980), Jeans (1975).
- 96 A notable exception is MacCormick (1978), (1980), (1984).
- 97 See bibliographies in *TEBW* and Twining (1983) and Tillers and Green (1988). [See below 332–4. For recent surveys see *Analysis* (2005) ch. 9 and Appendix I, and Roberts and Zuckerman (2004) 116–32.]
- 98 Wigmore (1913a), (1937).
- 99 Bennett and Feldman (1981).
- 100 Abu Hareira (1984), (1986); Schum and Martin (1982); cf. Tillers (1983), cited below, 309.
- 101 Wigmore (1937), 821. On the chart method, see above 12 n. 15.
- 102 Ibid.
- 103 *TEBW* (1985); Anderson and Twining (1998); Schum and Martin (1982). [*Analysis* (2005) chs. 4 and 5 and MacCormick (2005), ch. 11.]
- 104 Wigmore (1937), 821–2.
- 105 Ibid.
- 106 Bennett and Feldman (1981), dust jacket and preface. For a more moderate account see Hastie, Penrod and Pennington (1983), in which they develop a psycho-linguistic ‘story model’ of juror decision making. [See further Pennington and Hastie (1991), Wagenaar et al. (1993), Wagenaar and Crombag (2005).]
- 107 Bennett and Feldman (1981), 41; cf. *ibid.* 67.
- 108 *Ibid.*, 62–3.
- 109 Bennett and Feldman (1981), 33; cf. *ibid.*, 65.
- 110 It could be argued that Wigmore and Bennett and Feldman are engaged in very different enterprises. Wigmore’s Chart Method is a recommended intellectual procedure for analysing, criticizing and constructing arguments based on evidence. It is part of a prescriptive ‘logic of proof’. Bennett and Feldman purport to be presenting a sociological analysis of how lawyers, judges and jurors in fact ‘reconstruct reality in the courtroom’. As such it is a contribution to an empirical, or interpretative, sociology of law. However, the connections are closer than appear on the surface. For Wigmore claims that what he is recommending is a usable, practical tool that reflects the practices of the best lawyers. His Chart Method is a systematization of good practice. Conversely, Bennett and Feldman, while primarily concerned with description and explanation, imply that the kinds of story-telling that they found in their data represent both inevitable and legitimate procedures for decision. They use their ideal types of ‘case construction strategies’ to explain (and by implication to criticize) deviant practices, such as disruptive and diversionary tactics (123–31) and the intrusion of bias into trial process (ch. 8). Accordingly, like Wigmore, they provide standards for criticizing the actual practices of advocates and triers of fact.
- 111 See n. 97 above.
- 112 Abu Hareira (1984), (1986).
- 113 Tillers (1983), 986n.
- 114 See works cited in n. 100 above and *TEBW*, 183–5. Neither Abu Hareira nor Tillers denies a role to analysis and logical testing of the validity and cogency of arguments about disputed questions of fact. Like Bennett and Feldman, Abu Hareira appears to

give such analysis a secondary place, as providing subordinate tests in a process in which attempts to individuate items of evidence in the process of evaluation involves an artificial, unwarranted and often dangerous attempt to dissolve the indissoluble. His theory echoes the traditional suspicion of practising lawyers of 'over-logical' approaches. Tillers, on the other hand, is self-consciously appealing to a different philosophical tradition in challenging the conceptions of rationality espoused by Wigmore and most participants in recent debates about probabilities. See now MacCormick (1980), (1984) and B. Jackson (1988a).

115 See further [*Analysis* (2005), ch. 5.]

116 There are two further points of agreement in all of the theories mentioned. All agree that one of the most important tests of the plausibility of a story or theory is its compatibility with uncontroversial or incontrovertible particular facts. It is a basic precept of advocacy (and detection) that one should confront uncomfortable facts (or evidence) both in constructing one's theory of the case and in presenting an argument. On the whole it does not pay to ignore or gloss over or try to divert attention from undisputed or credible facts. Rather one should explain them away or reinterpret them or acknowledge them, but seek to show that one's account is consistent with them. This is a different kind of 'consistency' from the internal consistency of the story considered apart from this evidence. Novels are generally supposed to be 'consistent', without having any direct connection with actual events in the real world. For a stronger version of a coherence theory see now B. Jackson (1988a). Of course, many stories appeal to a community's stock of stories. [Haack elegantly steers between correspondence and coherence theories of truth under the inelegant rubric of 'foundherentism': Haack (1993).]

117 See 142 n. * above and B. Jackson (1988a).

118 J. B. White (1985) 160; cf. *ibid.*, 174.

119 See generally, Summers and White in Twining (1983), Zuckerman (1986a) and Guest (1987).

120 Holmes (1897), White (1985) warning against over-emphasizing the importance of outcome. [On 'the Bad Man' see Twining (2000a) ch. 5.]

121 Cf. the morality tale of the lawyer's son who was charged with breaking the schoolroom window: 'In the first place, sir, the schoolroom has no window; in the second place, the schoolroom window is not broken; in the third place, if it is broken, I did not do it; in the fourth place, it was an accident' (Punch, cited Williams (1973), 21).

122 On decisions to prosecute, see Mansfield and Peay (1987).

123 Trilling (1982). The following passage is an analysis of Diana Trilling's report of the Jean Harris trial as she observed it. The accuracy of the report is not in issue here. For a different view of the trial see Harris (1986). Diana Trilling's book about the case is a piece of impressionistic and imaginative reporting of the trial, presented as 'a work of social criticism'. 'My initial response was one of unqualified sympathy for the headmistress and I conceived the book in a spirit of partisanship' (at 9). As she sat through the trial and pondered what she had read and seen and heard, the work became transformed as she tried to make sense of the case. Her account needed a resolution, not just an outcome: 'Whatever one's judgment of Mrs Harris's guilt or

innocence, or one's reaction to her as an individual, she was the person in this story who unmistakably had a fate, like a character in fiction. Dr Tarnower hadn't a fate; he had only an outcome, a conclusion to his life' (at 23). 'This story' is, of course, Mrs Trilling's story of Mrs Harris and her case. There have been, and no doubt will be, many others built on the same historical events. The point of the story in this particular interpretation is not the killing of Dr Tarnower nor the outcome of the trial nor the picture of American criminal process in action, but the character of Mrs Harris that was revealed by the courtroom drama and how it explained her behaviour before and during the trial. For Diana Trilling,

Mrs Harris has star quality . . . without the armature of fiction, she can all too easily become a clinical study. She belongs to imaginative writing, where, as I say, Freud learned, as we learn, about character in conflict. Mrs Harris was unable to bring her inner contradictions into reliable working agreement, but our interest in her derives precisely from the unresolved opposition between her conscience and her impulses. She belongs to the novel in the way that Emma Bovary does, or Anna Karenina. They too were characters in contradiction. (at 435, 431)

What started 'as a story of sexual and social politics' (blurb) became transformed into 'faction', an imaginative and speculative interpretation of an interesting character. This, it seems, is the only way in which Mrs Trilling could make sense of her story-as-a-whole.

Mrs Harris's recent book *Stranger in Two Worlds* (1986) is also an account of herself. It covers her early life, her career as headmistress and her experiences in prison. Only two chapters deal in any detail with the events immediately surrounding the death of Dr Tarnower and with her trial.

124 Trilling (1982), 422.

125 Ibid., 414–20.

126 The first three 'arguments' can be extrapolated from Trilling's account at 356, 233, 216–17; cf. 420–38. Possible feminist interpretations of the case are only lightly touched by Trilling, e.g. 9–12.

127 Ibid., 422–3.

128 Ibid., 219–20, cf. 226.

129 Ibid., 357.

130 Newspaper reports.

131 On the different uses of 'case' in legal discourse see above n. 27 and below ch. 13 at 311–18.

132 The *locus classicus* is Frank (1949).

133 This theme is developed in Twining (1986d).

134 *Brown v Board of Education* 347 US 483 (1954), 349 US 294 (1955).

135 *R v Dudley and Stephens* (1884) 14 QBD 273, affirmed (1885) 14 QBD 560.

136 Compare the treatments of *Dudley and Stephens* in the law reports and by Simpson (1984a).

137 The questions of law in *Donoghue v Stevenson* [1932] AC 562 were decided by the House of Lords on the basis of the averments which were never put to the proof, and the case was settled before 'the facts' were determined by a court.

138 Sykes and Heywood (1987) (unpublished) report that psychologists, who have studied the phenomenon of story-understanding and recall, maintain that story grammar comprises four elements: setting, theme, plot and resolution. Reports of cases in the law reports can be readily analysed in these terms: the setting (S) represents the procedural context of the case; the theme (T) represents the issue of law which the court was called upon to determine and which is the basis for treating the case as a precedent (the point of the case); the plot (P) is the facts of the case; and the resolution (R) is how the court decided that issue of law for this and future cases. Thus a precis of *Candler v Crane Christmas* could be rendered as follows:

S: In *Candler v Crane Christmas* the plaintiff in an action for negligence appealed to the Court of Appeal against a decision of the Queen's Bench.

P: The defendants in the action were professional accountants who had negligently prepared a statement of accounts which gave a misleading picture of the financial position of the company. The accounts were prepared with the intention and expectation that the plaintiff would be guided by them in deciding whether to invest in the company. On the faith of the accounts he made the investment and as a result he lost his money.

T: The issue was whether a duty of care for negligent mis-statements is owed to the plaintiff in such circumstances.

R: The Court of Appeal decided that no such duty exists (Denning MR dissenting), but this decision was later overruled in *Hedley Byrne v Heller* and the modern law of negligent misstatement was born.

In this rendering, there are at least three stories. The story *in* the case (the facts); the story *of* the case as reported in [1952] All ER, and the story of the development of liability for negligent misstatement, in which *Candler v Crane Christmas*, and Lord Denning's judgment in particular, played an historic role. Each of these three stories can readily be made to fit the grammar (S), (T), (P), (R).

139 Simpson (1984a).

140 Twining (1986d).

141 Ibid.

142 The literature on the *Sacco-Vanzetti* case is massive. The main sources of the discussion here are Joughin and Morgan (1948), Felix (1965) and Frankfurter (1927, 1961). [Since this essay was written the case has been subjected to a book-length Wigmorean analysis by Kadane and Schum (1996).]

143 The remark has been attributed to H. L. Mencken, but I have been unable to trace the source.

144 Felix (1965).

145 Discussed Twining (1973a), 341–9.

146 Felix states: 'The Sacco-Vanzetti case became a legend of innocence betrayed. It became more: a parable about betrayal in American society' (Felix (1965), 240). I would suggest that this is only one of many different, but overlapping, interpretations.

147 *The Letters of Sacco and Vanzetti* were published in 1924, edited by Marion Frankfurter and Gardner Jackson; the latter was in charge of the public relations of the Sacco-Vanzetti Defense Committee. Felix, whose interpretation of the case and of Vanzetti himself is less sympathetic than mine, commented: 'the published edition of the letters

is a carefully edited fraction of the prisoner's epistolary production, which is crueler, rawer, less grammatical, more violent and more vital' (Felix (1965), 256).

148 Some writers argue that 'legal truth' is different from 'historical truth' and that trials are not concerned with historical truth. This is a mistake. One consequence of this view would be to deprive legal discourse of strong conceptions of 'mistake' or 'miscarriage of justice'. I may believe that Sacco and Vanzetti or Dreyfus or Luke Dougherty were victims of injustice on one or more different grounds:

- 1 There were technical irregularities in the proceedings which should, according to the rules, have been grounds for questioning the conviction. For example, an inadmissible confession or hearsay was admitted.
- 2 Unfair procedures were followed. For example, the trial was conducted in an atmosphere of prejudice against the accused.
- 3 The evidence adduced at trial did not satisfy the standard of proof beyond reasonable doubt.
- 4 As a matter of historical fact the accused was (were) innocent. For example, there was a mistake of identity; the crime was committed by someone else.

These are all four examples of miscarriages of justice. But accounts of great injustices would nearly always be qualitatively different, if claims of type (4) were ruled out. Legal discourse needs the categories of historical truth and historical error.

149 The suggestion that stories are one means of resolving such tensions fits in with the thesis of Clifford Geertz that the Western polarization of fact and law (and similar dichotomies) misleads us about the reality of our own processes. These may not be so very different from notions of judgement in other cultures that are expressed by such concepts as *dharma*, *haqq* and *adat* (Geertz (1983) esp. chs. 4 and 8).

Narrative and Generalizations in Argumentation about Questions of Fact*

A familiar feature of academic life is the phenomenon of two or more bodies of literature ‘talking past each other’, even though the problems and issues they address seem to be closely connected. Within the discipline of law, a striking example is the almost entire separation of literature and debates concerning argumentation about questions of law on the one hand, and questions of fact on the other. The term ‘legal reasoning’ has been imperialistically hijacked for the former by jurists who seem to know little or care less about the latter, which has been variously referred to as ‘the logic of proof’, ‘evidence and inference’, ‘fact determination’ and so on. Ronald Dworkin does not concern himself with Bayes Theorem; Bayesians and inductivists alike do not concern themselves much with Dworkin or other theorists of legal reasoning. Yet every lawyer knows distinguishing between ‘questions of law’ and ‘questions of fact’ is problematic, contingent, and often unsustainable. Surely issues about the validity, cogency, and appropriateness of reasoning about questions of law and questions of fact are intimately related aspects of ‘lawyers’ reasonings’,¹ which in turn is part of the more general topic of practical reasoning.²

Within evidence scholarship, a similar, but less sharp, bifurcation can be discerned between the literature on ‘the logic of proof’ (including debates about probabilities and proof) and the largely empirical literature on the role of narrative and stories in fact determination. Here the divide is not so great, for some writers have acknowledged a place for both in the study of evidence in legal contexts.³ However, many puzzles remain about the relationship between stories and reasoning in argumentation in legal contexts. This paper attempts to explore one aspect of this relationship and to further undermine the separation of discussions about questions of law and questions of fact.

It may be helpful to set my topic in a historical context. A brief overview of the development of ‘the new evidence scholarship’⁴ might be restated as follows: Questions about the nature of evidence and inference in law can be traced back at least to the eighteenth century, and beyond that to the convoluted history of rhetoric.

The modern Anglo–American debates about ‘the logic of proof’ could be said to have begun about 1970.⁵ In retrospect one can distinguish five main phases. There was, first, a quite practical concern that lawyers were generally innumerate

and as such were unable to cope with the rapidly increasing use of statistics in litigation, especially in areas involving expert evidence with respect to such matters as paternity, discrimination, antitrust, and insurance.⁶ This problem was dramatized by the difficulties encountered in dealing with even the most elementary misuse of statistics by an alleged 'expert' in the famous case of *People v Collins*,⁷ which involved identification of an interracial couple in California. The first commentators stressed the potential of statistical analysis in evaluating evidence – provided that it was properly used.⁸

The second phase, led by Professor Laurence Tribe of Harvard, was directed at curbing the enthusiasm of mathematicists.⁹ Tribe and others argued that even if all reasoning about disputed questions of fact is in principle mathematical, it would be both inappropriate and dangerous as a matter of policy to encourage or allow explicit quantification of such matters as the criminal standard of proof or the likelihood of guilt in identification cases.¹⁰ Three main reasons were advanced for this: (a) as a matter of communication, as long as judges and juries can be assumed to be innumerate, they should be addressed in a language they can understand; (b) mathematical arguments are likely to be overly seductive or prejudicial because seemingly 'hard' quantified variables will tend to push out 'soft', non-quantitative variables; and (c) it is politically improper to quantify certain matters, such as an acceptable level of risk of conviction of the innocent.¹¹

In the next phase, the debate moved to a quite different, more philosophical plane with the intervention of Jonathan Cohen, a logician from Oxford. He challenged the assumption that all arguments about probabilities are in principle mathematical or, as he termed it, Pascalian.¹² Law, he suggested, provides one of the paradigm examples of non-Pascalian inductivist reasoning.¹³ Cohen stimulated controversies in several disciplines, notably law, medical diagnosis, and psychology.¹⁴ Although it was based on philosophical arguments, Cohen's thesis clearly had political implications. It served as a warning against 'the cult of the expert' and provided theoretical support for the belief in the cognitive competence of ordinary citizens to make sound judgements based on everyday practical reasoning.¹⁵ This is particularly significant in jurisdictions that place a high value on lay participation in the administration of justice. In this view, innumerate judges and ordinary jurors are competent to adjudicate disputed questions of fact and are usually justified in relying on 'common sense'. Cohen's thesis provoked sharp attacks from jurists in England, Australia, and especially the United States.¹⁶

A fourth phase has seen strong challenges to the rationality of the kinds of propositional logics espoused by both mathematicists and inductivists. These challenges have taken several forms: practising lawyers, especially in England, remain highly sceptical about the scope of mathematical reasoning and formal logic in legal contexts.¹⁷

Sceptics, relativists and subjectivists of various kinds question traditional conceptions of rationality or even the very possibility of rationality in fact determination.¹⁸ Also, there seems to be as great a chasm between the mathematicists and even

the most moderate of the growing melee of post-modernists.¹⁹ Most immediately relevant in the present context is the work of empirical social scientists, notably Pennington, Hastie, Bennett, and Feldman, who have produced compelling evidence that in practice, jurors and other triers of fact reach judgements about particular past events by assessing the plausibility of stories.²⁰ Jurors, it is said, proceed ‘holistically’ by comparing competing stories, by deciding on the plausibility of the story offered by the prosecution (or other proponent), by reconstructing their own version of events from the material presented to them.²¹

In the last few years, ‘the New Evidence Scholarship’ could be said to have entered a fifth phase. Scholars from the Netherlands, led by Professor Hans Nijboer of Leiden, have introduced recent Anglo–American ideas into continental Europe and, in the process, have stimulated a revival of interest in the study of the theory and practice of proof in civil law systems.²² More recently, three psychologists from the Netherlands have analysed and criticized the criminal process in their own country on the basis of a theory of ‘anchored narratives’ that draws heavily on American literature.²³ This suggests that the story model is not confined to juries or common law adversary proceedings.

There is an apparent tension between psychological accounts of ‘holistic’ storytelling in decision making involving reconstruction of particular past events and ‘atomistic’, analytical accounts of reasoning about questions of fact. This paper deals with one aspect of this relationship. The problem can be restated as follows: the logicians assert that background generalizations are necessary in reasoning about questions of fact, and the psychologists tell us that stories are necessary in the process of decision making in this context. Yet, it is quite easy to show both are potentially subversive of orthodox rationalist conceptions of fact determination. In short, both generalizations and stories are necessary, but dangerous in this context. There seems to be a pattern, but what is the exact relationship between the normative thesis of the logicians and the empirical findings of the psychologists? Let us first look briefly at the standard accounts.

Generalizations: necessary but dangerous

Mainstream evidence theory gives a central place to the role of generalizations in ‘rational’ fact determination. Every inferential step from particular evidence to particular conclusion – from *factum probans* to *factum probandum* requires justification by reference to at least one background generalization. In David Schum’s phrase, generalizations constitute the ‘glue’ of inferential reasoning.²⁴ They can also be used in the formation of hypotheses, to fill in gaps in stories, and, as a last resort, as anchors for parts of a story for which no particular evidence is available.²⁵ They are necessary as providing the only available basis for constructing rational arguments. This orthodox view is in line with theories developed by Toulmin, Perelman, the Amsterdam School of Argumentation, and most recently by David Schum.²⁶

It is widely recognized that such generalizations may be more or less indeterminate, unarticulated, vague, or precise. They may be backed by scientific evidence, 'general knowledge', sheer speculation, or prejudice.²⁷ They are often overtly or covertly value laden. They are said to be rooted in what passes for common sense or knowledge in a given society (or sub-group) at a given time. Thus, judgements of fact are rooted in and justified by a society's 'stock of knowledge' or stock of beliefs. The Rationalist Tradition, at least in its more sophisticated forms, explicitly recognizes that knowledge and beliefs change over time.²⁸ In short, the 'glue' for arguments on questions of fact is often historically contingent, culturally relative and value laden.

Generalizations are dangerous in argumentation about doubtful or disputed questions of fact because they tend to provide invalid, illegitimate, or false reasons for accepting conclusions based on inference. They are especially dangerous when they are implicit or unexpressed. For example:

- 1 the warranting generalization may be *indeterminate* with respect to:
 - (a) frequency or universality (all/most/some);
 - (b) level of abstraction;
 - (c) defeasibility (exceptions, qualifications);
 - (d) precision or 'fuzziness';
 - (e) empirical base/confidence (accepted by scientific community; part of everyday first-hand or vicarious experience; speculative etc.);
- 2 it may be unclear as to identity (which generalization – there may be rival generalizations available to each side in a dialogue) or source (whose generalization – e.g. male/female experience in a domestic violence case);²⁹
- 3 there may not in fact be a 'cognitive consensus' on the matter, especially in a plural society;
- 4 value judgements (including prejudices, racist or gender stereotypes) may be masquerading as empirical propositions;
- 5 when articulated, a generalization may be expressed in value-laden language or in loaded categories.³⁰

Thus, generalizations are dangerous because, especially when unexpressed, they are often indeterminate with respect to frequency, level of abstraction, empirical reliability, defeasibility, identity (i.e., which generalization), and power (i.e., whose generalization). They are powerful vehicles of prejudice and bias that may be concealed. In the process of articulating an unexpressed generalization, there is scope for using emotive language, giving a misleading impression of precision or confidence, or presenting value judgements as if they were empirical facts. Such tendencies are seen as dangerous in the sense that once it has been clarified what precisely is being argued, it may be shown that the argument is invalid or weak because the generalization or its application in this case may be subject to rational criticism.³¹

Stories: necessary but dangerous

As we have seen, another recent tributary in the same mainstream is the idea that stories and story-telling are central to fact determination. The second thesis is that stories and story-telling are psychologically necessary to decision making in legal contexts, but are dangerous in that they often can be used to violate logical standards, appeal to emotion rather than reason, and subvert legal principles and conventions.

Empirical research by Bennett and Feldman,³² Pennington³³ and others suggests that American juries determine ‘the truth’ about alleged past events mainly by constructing and comparing stories rather than critically evaluating arguments from evidence. These findings have been confirmed in other disciplines (e.g. medical diagnosis and history) and extended to fact determination by legal professionals and the police.³⁴ Simply put, the widely accepted thesis is that human beings need stories in order to make certain kinds of decisions and, more generally, to make sense of the world.

The literature is less clear about the functions of story construction and comparison. Bennett and Feldman say they are used to fill in gaps; others suggest in order to be satisfied, triers of fact need to explain human motivation and action, even when motive is not a material fact, or when the facts to be determined relate to a static situation or a single ‘simple’ fact such as identity.³⁵ There is scope for disagreement as to whether stories are psychologically necessary in all situations involving fact determination in legal contexts (e.g. identity in a motiveless murder), but there seems to be a consensus that they are in practice felt to be very important a great deal of the time.

Story-telling can also be shown to be dangerous in legal contexts in that it can be, and is often, used to violate or evade conventional legal norms about relevance, reliability, completeness, prejudicial effect, etc.³⁶ It is widely regarded as appealing to intuition and emotion and as a vehicle for ‘irrational means of persuasion’. Examples of such dangers include:

- (a) sneaking in irrelevant facts;
- (b) sneaking in invented or ungrounded facts;
- (c) suggesting facts by innuendo;
- (d) focusing attention on the actor rather than the act;
- (e) appealing to hidden prejudices or stereotypes;
- (f) telling the story in emotionally toned language;
- (g) telling a story that may win sympathy for the speaker or the victim but is irrelevant to the argument;
- (h) making use of dubious analogies;
- (i) subverting lawyers’ distinctions between fact, law, and disposition and, more generally, fact and value; and
- (j) good stories pushing out true stories.³⁷

The relationship between stories and generalizations

It might be objected that the two theses apply to different spheres of discourse. Generalizations are logically necessary in the context of rational argument; stories are psychologically necessary in the context of human decision making. The logical 'dangers' are different from the dangers of poor judgement.

The relationship between logic and psychology in relation to decision making is a very large subject. Here, I shall confine myself to two points. First, I accept that some of the functions of story-telling are to do with human interaction and communication, and are not performing a function in an argument. For example, in oral presentation by an advocate, stories may legitimately be used to attract and retain interest, set a comprehensible context, and provide concrete illustrations to assist understanding. They may, of course, be used to distract attention or win sympathy for the speaker or the victim independently of what is at issue and so on. So, some of the dangers are to do with communication rather than argumentation.

However, stories also seem to have a place within arguments and questions can be asked about the legitimacy, validity or cogency in this context. Some of the allegations about the dangers of stories seem to be appealing to standards of rationality. For example, a story winning sympathy for the speaker independently of the issue can be criticized as irrelevant to the argument; where a good story pushes out a true story, it can be criticized on the ground its attraction is to do with something other than truth (e.g. excitement, reassurance, titillation), and undue weight is being given to it. Where a story is used to fill in gaps in the evidence, its justificatory force may be little or none, and it seems odd to say that an argument about a question of fact is bolstered by claiming the situation is analogous to a work of fiction or a parable.³⁸ One version of this position may be restated as follows: in ordinary life and in making important decisions we need stories in order to 'make sense' of the world and of particular past events; in factual enquiries, including adjudication, for a story to be accepted as true it needs to be warranted by (or anchored in) evidence. A well-formed story needs to be coherent, but to be true, it must be both plausible and backed by particular evidence. Plausibility is tested by background generalizations; the truth of specific factual conclusions is tested by reasoning from particular evidence.³⁹

There are also important examples, mainly in the Anglo-American literature on advocacy and adjudication, of claims that stories play a crucial role not merely in respect of presentation and rhetoric, but analytically as part of an argument. For instance, in a much cited paper, John W. Davis maintained, 'in an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself.'⁴⁰ Similar statements have been made by Karl Llewellyn, James Boyd White and other American jurists.⁴¹ The precise meanings of such statements are not always clear, but it is reasonable to interpret them as maintaining that such notions as stories need to be accommodated within a conception of

rational argument in legal contexts. Such claims are controversial, but if, for the sake of argument, we accept them as plausible, the question remains: What is the relationship between stories and generalizations in this context?

Perhaps the main link between stories and generalizations in this context lies in the idea of 'a stock of knowledge'. A 'stock of knowledge' does not consist of individual, empirically tested, and readily articulated propositions; rather, both individually and collectively, we have ill-defined agglomerations of beliefs that typically consist of a complex soup of more or less well-grounded information, sophisticated models, anecdotal memories, impressions, stories, myths, proverbs, wishes, stereotypes, speculations, and prejudices. Fact and value are not sharply differentiated. Nor are fact, fantasy and fiction. Nor can one take for granted either consistency or coherence within an individual's or a society's 'stock of knowledge'.

The content of a 'stock of knowledge' does not consist solely or mainly of ready-made generalizations, still less of empirical laws. Beliefs may be embedded in stories, examples, and experiences that are particular and may not have been articulated in general terms. There is often considerable indeterminacy about what moral or general lesson or other generalization(s) may or will be extrapolated from such material.

A high degree of consensus about the contents of the social 'stock of knowledge' or beliefs cannot be taken for granted, especially in a plural or a stratified society.⁴² Moreover, so much of 'common sense' that is indeed common in a given society is relative to time, place, and subject matter. Beliefs vary and beliefs change. We may treat ideas such as 'story' and 'stock of beliefs' as cultural near universals, while recognizing their fluidity over time and space. Even within subgroups, this gives plenty of scope for diversity and hence 'relativism', at least in a weak sense.

X = X = X

Generalizations may be indeterminate as to their application; stories may be indeterminate as to their significance. There is an intimate interaction between the general and the particular in all arguments about questions of fact. One aspect of the relationship between generalizations and stories can be usefully analysed with greater precision. Generalizations are, by definition, general; stories are particular.⁴³ There is, as every lawyer knows, an intimate relationship between general rules and particular cases. Similarly, as every theologian and moralist should know, there is an intimate relationship between parables (and other morality tales) and their significance. That significance can be expressed in such terms as the point or the moral or some other general lesson or idea that it illustrates.⁴⁴ Stories appeal strongly to the imagination. Part of that appeal lies in their concreteness and their particularity. That power can be undermined if the moral or point is spelled out or otherwise made explicit. Why this should be so, is crucial in the present context.

The idea of precedent as a source of law is an especially clear illustration of the interaction between the general and the particular. Because precedents are especially important in the common law, there has been much theorizing and controversy about the relationship.

We need not venture into that old controversy here because on several relevant points there is widespread agreement. 'The facts' of a case are particular. The facts, at least in a hard case, give rise to a question of law. Such questions of law should be expressed in general terms, not 'is the defendant guilty or liable?' but 'in circumstances of this type, is the defendant guilty or liable?'⁴⁵ In deciding the particular case, the court gives an authoritative answer to the question(s) of law. That answer may be explicit or implicit.⁴⁶

The relationship between the facts, the issue(s), and the answer can be formally restated as follows: the facts = X happened; the issue = if X happens, then what? (legal consequence); the answer = whenever X happens, then Y.

In this formulation X is a constant despite the transition from particular to general. This transition from a particular situation to general questions and a general answer involves a shift from 'this was the situation' to 'in situations of this type, the law prescribes . . .'. The crucial point in this context is that X is a constant. In short, $X = X = X$.

One of the main problems in interpreting cases is that the level of generality of X is indeterminate. The same applies to 'the moral' of parables and morality tales. But if the facts are known, and if $X = X = X$, how can X be clear at the particular level, but unclear at the general level? The answer is, of course, that how exactly the facts are to be categorized is also indeterminate. X represents a particular situation seen as a type. How precisely that situation should be interpreted, what elements are material, and what is the best or an appropriate description of the situation is a matter of interpretation. And, since $X = X = X$, the problem of interpreting X is almost constant.⁴⁷

Descriptions of situations are typically expressed in language. The choice of language is not significant solely because of the more or less obvious rhetorical potential of emotive or value laden terms. For example, a categorization may be judged appropriate because it reflects the way a significant reference group thinks or talks (for instance, using the concepts of a particular trade to describe the situation in a commercial case), or because it corresponds with or fits, explicitly or implicitly, some general principle or policy (for example, describing a situation in a way that brings out that a non-expert was relying on the judgement of an expert in a reasonably proximate relationship).⁴⁸ This idea of choosing appropriate categories to describe particular fact situations is at the core of Karl Llewellyn's important, but elusive, idea of 'situation sense'.⁴⁹

Some of the alleged 'dangers' of stories shared with generalizations include, for example, presenting unsupported facts as if they were anchored or appealing explicitly or implicitly to biases or prejudices. Perhaps the most obvious common element is indeterminacy: indeterminacy as to what exactly is being argued or what

is the general significance of the particular example. For example, what precisely is the moral of the parable of the prodigal son? Indeterminacy is generally presented as a weakness in an argument. But, as John Wisdom points out, one of the attractions of case-by-case argument is that one is not forced to define the boundaries of X in advance.⁵⁰ It can be valid and sensible to say ‘this is a clear case of X’ without *defining* X. That is part of the key to understanding the attraction of precedent at common law. It is a form of argument by analogy which does not commit the arguer to a position beyond what is needed for the case at hand. This may be why in theology, emphasis in moral education and precedent at common law on particular stories often treat indeterminacy as a virtue.

- * Originally published in *Festkrift Till Stig Strömholm* (1997) (Uppsala) 821–33 and, in revised form, in (1999) 40 *South Texas Law Review* 351.
- 1 The useful term ‘lawyers’ reasonings’ was coined, or at least popularized, by Julius Stone (1964) 325. Unfortunately, Stone followed convention in confining his attention largely to reasoning about disputed questions of law in hard cases. See *ibid.*, at 301–37. The term can usefully encompass and draw attention to the relationships between, for example, reasoning in negotiation, sentencing, rule making, other lawyers’ operations, and the two more standard topics of questions of law and questions of fact.
- 2 *LIC* 348–50.
- 3 See generally *Analysis* (2005) (exploring the uses of logical analysis and story-telling in the fact-finding process); Binder and Bergman (1984) (outlining the uses of empirical proof and story-telling in the fact finding process).
- 4 The term ‘New Evidence Scholarship’ was coined by Richard Lempert (1988) (referencing specifically the debates about probabilities and proof). Since then, it has been expanded to cover a much wider range of topics relating to evidence and information in law. [See Jackson (1996) and above 244–8.]
- 5 The phrase ‘the logic of proof’ was coined by Wigmore (1913a) to depict that part of the field of Evidence dealing with what constitutes valid, cogent, and appropriate arguments about disputed questions of fact in adjudication. It is used here to include inductivist, Bayesian, sceptical, and other perspectives on analysis and argumentation about questions of fact in legal contexts. While Wigmore focused mainly on contested jury trials, his successors have extended the application of the basic ideas to other kinds of proceedings, other phases of the legal process (including police investigation, which Wigmore dealt with briefly in an appendix), and non-common law systems, in this case the Netherlands.
- 6 See Barnes (1983), 33–4.
- 7 438 P 2d 33 (Cal 1968). In recent years it has often been argued that lawyers and judges can no longer afford to be innumerate. See Barnes (1983) xv; Eggleston (1983) 1–7; John Kaplan (1968), 1065, 1092. For anthologies of contributions to the debates see generally Imwinkelried and Weissenberger (1996) (combining numerous authors’ works regarding various evidentiary subjects); Twining and Stein (1992) (bringing together the leading trends and thoughts concerning legal fact finding).

- 8 Above 74–5.
- 9 See Tribe (1971).
- 10 See *ibid.*, at 1332–8 (giving examples of cases where mathematical probability confused juries).
- 11 See *ibid.*, at 1334–8.
- 12 See Cohen (1977) 38–9 (arguing that lawyers use non-Pascalian inductive reasoning about questions of fact).
- 13 See *ibid.*, at 44.
- 14 See *ibid.*, at 258–63.
- 15 See *ibid.*, at 120.
- 16 See 127–30. These three strands in the probabilities debate continue to command attention in the common law world. For example, a lawyer and a statistician based in New Zealand published a practical manual directed toward forensic scientists and lawyers outlining a Bayesian approach to scientific evidence. See Robertson and Vignaux (1995), 17–18; cf. Aitkin (1995), 34–6 (discussing Bayes’ theorem and the evaluation of evidence). Similarly, at both theoretical and practical levels, the debates between Bayesians, frequentists, inductivists and others have continued. Developments such as DNA testing and evidence have naturally attracted the attention of statisticians, and I have learned that many of the applied problems my colleagues in statistics are studying have implications for forensic contexts, police investigations and other legal processes. See Kadane and Schum (1996), 121–31; Schum (1994), 243–61. [See further *Analysis* (2005) ch. 9 and Appendix I.]
- 17 See, e.g., Cross and Tapper (8th edn, 1995), 173; *contra R v Adams (No. 2)*, CA *The Times*, 3 November 1997 (rejecting the use of Bayes’ theorem by the English Court). [See now Roberts and Zuckerman (2004), ch. 3.]
- 18 Above ch. 4.
- 19 See 142n.*. See also Nicolson (1994), 726, 729–30 (recognizing the two sides in that fact finding involves more than substantive law, and no matter how formally the law is looking at factual truth, ethics, justice and politics play a part in the legal process); Seigel (1994) 995–6 (noting that evidence scholarship has been distorted by foundationalism and legal positivism).
- 20 See Bennett and Feldman (1981); Hastie et al. (1983) 22; Pennington and Hastie (1991) 530–1. Bernard S. Jackson has added a semiotic dimension to these studies. See Jackson (1988a) 7–12; Jackson (1995) 140–93. For a balanced appraisal of these developments see generally Schum (1994).
- 21 See Hastie et al. (1983), at 22–3; Pennington and Hastie (1991), at 556.
- 22 In addition to his own extensive writings on the subject, Professor Nijboer has organized a series of conferences, the first being in Amsterdam in 1992. See generally Nijboer, Callen, and Kwak eds. (1993) (a symposium on expert evidence); [Nijboer and Reijntjes (eds.) (1997); Malsch and Nijboer (1999)].
- 23 See Wagenaar et al. (1993). This was condensed and translated into English from *Dubieuze Zaken* (1992), discussed in Twining (1995).
- 24 See Schum (1994) at 82–3, 109.
- 25 See Wagenaar et al. (1993) at 20–43.

- 26 See generally van Eemeren and Grootendorst (1992) (explaining the pragma-dialectical approach to argumentation); Perelman (1963) (containing the author's most important writings on justice); Perelman and Olbrechts-Tyteca (1971) (suggesting Perelman's theory of argumentation will help to develop the justification for actions when justifications cannot be based on objective truth or reality); see also Schum (1994); Toulmin (1964) (suggesting jurisprudence rather than mathematics should be the model in analysing rational procedures, and that logic should not be a purely formal study but rather a comparative one).
- 27 [Anderson (1999b); *Analysis* (2005), ch. 10.]
- 28 Above 75–8.
- 29 See Martinson et al. (1991) 23, 36–44.
- 30 For examples of these 'dangers', see *Analysis* (2005), ch. 10.
- 31 One of the main uses of Wigmore's chart method of analysis is to clarify precisely what is being argued by forcing into the open the articulation of steps in the argument, especially generalizations, which are usually left implicit or unstated, thereby making them more easily subject to critical scrutiny.
- 32 See Bennett and Feldman (1981), at 10–18.
- 33 See Hastie et al. (1983) at 20–3.
- 34 For example, Wagenaar et al. (1993) (discussing the use of narratives in fact finding situations).
- 35 In private discussions, Terence Anderson and I have differed on whether stories are 'necessary' in all cases, my own view being they undoubtedly play an important role in most cases, but in some instances simple facts (e.g., alibi, illegally parked car) may suffice and a story is not required.
- 36 See above ch. 10.
- 37 For further analysis and examples see above ch. 10. For a useful development of the distinction between good and true stories see Wagenaar et al. (1993). In fact, the notion of a good story is ambiguous. It can mean just a well-formed story, which relates to its internal structure and coherence, or it can relate to fitness for different purposes or the actual effect on an audience. I may exaggerate some incident in order to make people laugh, win sympathy, or justify my part in it; an audience may find a story good because it is interesting, intriguing, unexpected, or reassuring. In a battle of narratives, there will often be two competing versions of events, and in order to bolster one side, there may be a temptation to embroider or stretch the facts so as to strengthen the case. It may also happen that a story is considered not good because it ends in an anticlimax, ceases to have a point, or is not memorable – yet it may be true all the same. In criminal cases, one danger is that the trier of fact may be tempted to believe a story because it suggests a crime has been solved or because some other version of events might be threatening, inconvenient, or disturbing in some other way. Finally, a story may be appealing because it is *familiar* and fits into a schema that one recognizes. See below 398–9 (developing this point in relation to the case of *Warren* and the parable of the Prodigal Son). The tension between truth and entertainment value for journalists is candidly articulated by Janet Malcolm in her account of her first interview with Sheila McGough, an attorney who had been convicted of a number of charges relating to trust accounts: '[McGough]

talked almost incessantly for the two hours of our meeting. [But she] was not interested in telling a plausible and persuasive and interesting story. She was out for the bigger game of imparting a great number of wholly accurate and numbingly boring facts.’ Malcolm (1998), reviewed by Daniel Max, *Miami Herald*, 21 February 1999.

38 See below 398–9.

39 See generally Twining (1995) refining the view advanced by Wagenaar et al. (1993).

40 J. W. Davis (1953).

41 See above ch. 10.

42 See generally McCormick (1992), ch. 35 (discussing the relationship between cognitive consensus and a plural society); cf. Cohen (1977) at 274–6 (placing more emphasis on cognitive consensus as the basis for common sense reasoning). For a criticism of this passage, see *Analysis* (2005), at 273–6.

43 Following Ricoeur, I would stipulate that particularity, temporality, and connectedness are all necessary elements in the concept of a ‘story’ *stricto sensu*. See above 290.

44 This is developed in ch. 13 below.

45 See above at 221.

46 One area of controversy surrounds what weight to give actual words used by a judge in this context. Few consider that courts are formally bound by the precise wording, but in practice great weight is quite often attached to such formulations.

47 I say ‘almost’ because as a practical matter there are some differences. For example, in teaching beginning law students how to write a precis or note of a case, one advises them to adopt as a rule of thumb: ‘In respect of the facts, when in doubt include.’ The reason for this is that it is easier to edit out unnecessary detail than to add extra facts at a later stage. So a student’s preliminary note of a case contains not a definitive statement of ‘the facts,’ but a provisional formulation of potentially material facts. See Twining and Miers (1999), 307–8.

48 This example is based on Lord Denning’s famous ‘persuasive’ categorization of the facts in *Candler v Crane Christmas & Co.* [1951] 1 All ER 428, which was concerned with whether there is ever a duty of care in respect of negligent misstatements causing financial loss. See above 300–1.

They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in the company. On the faith of those accounts he did make the investment, whereas, if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money (*ibid.*, at 431).

49 See Llewellyn (1960) 230–4, discussed above at 297–9.

50 See generally Wisdom (1956), discussing case by case argument. See also Wisdom (1991) (containing discussion of the problematic effects of arguing inferentially from a static premise).

Reconstructing the Truth about Edith Thompson: The Shakespearean and the Jurist*

René Weis and William Twining

Introduction: two stories

This chapter links two stories, each with sub-plots. The first concerns one of the most famous cases in English legal history, the story of Edith Thompson and Frederick Bywaters, who were hanged in 1923 for the murder of Edith's husband, Percy. The second is the story of two scholars in different departments in the same institution who over several years had worked on the case and had each completed a substantial study before they learned of one another's interests. The first story is both a human tragedy and a historical mystery; the second exemplifies the fragmentation of learning and illustrates contrasting approaches to history by two scholars from different academic cultures. This chapter is a case-study of the methods of a jurist (William Twining) and a Shakespearean (René Weis) in approaching the question: Was Edith Thompson guilty of the murder of Percy Thompson? We shall start with the more modest tale.

The jurist's tale

WILLIAM TWINING

Early in the 1970s I began to use original trial records as a vehicle for teaching evidence to undergraduate law students, first at the University of Warwick and later at the University of Miami. I was concerned with both the theory of proof in legal contexts and certain practical techniques of inferential reasoning, as part of what is known as the logic of proof. In particular, I was interested in how to construct and criticize complex arguments based on evidence in legal contexts.

After a time, I settled on the case of *R v Bywaters and Thompson* as the best vehicle for my purposes simply because the evidence was both extremely complex and ambiguous. The case had the additional advantages of having real human interest and a secondary literature that was radically divided on the question of Edith Thompson's guilt. The key point, however, was the complexity and the intractability of the material. As one student put it, 'If you can analyse Edith Thompson's prose you can analyze anything.' In 1982 I gave a public lecture about the case. The

main purpose was to illustrate a particular method of analysing evidence, modified Wigmorean analysis.

I moved to University College London (UCL) in 1983, and continued to use the case in teaching, but it was not until 1987–8 that I revised and expanded my lecture into a long essay. I was making final revisions to my essay when I first heard that René Weis, a colleague in the UCL English Department, who is a Shakespearean scholar, had finished a book on the same case. When I read the book, which I greatly admired, I decided not to revise my original essay. Instead I wrote a second essay comparing our general approaches, our treatment of detail, and our conclusions.¹ Since then we have discussed the case both publicly and in private on a number of occasions. This chapter continues the conversation.

The Shakespearean's tale

RENÉ WEIS

In the early 1980s judicial issues featured prominently on the parliamentary agenda. In the wake of the House of Commons debate on the death penalty in July 1983, I read Arthur Koestler's polemical study, *Reflections on Hanging*,² which paved the way for the abolition of the death penalty in Britain. It was Koestler's remarks about Edith Thompson that first aroused my interest in the case of Bywaters and Thompson.

After reading *The Trial of Frederick Bywaters and Edith Thompson* (one of the volumes in the 'Notable British Trials' series),³ which also reproduces Edith Thompson's letters, I decided to write a biography of her. I was convinced that an account of Edith Thompson's life and death would make an effective contribution to the case against the death penalty. Although there now seemed to be almost universal agreement on her innocence,⁴ she remained a convicted felon in the eyes of the law. Furthermore, the manner of her death and the rumours about it had caused great controversy at the time, the repercussions of which were felt as late as the 1950s when Koestler's book appeared.

I was impressed by Edith's minute detailing in her correspondence of life in London in the early 1920s, and by her vivid discussions of books, plays, and music-hall shows. As a professional reader of literature, I was intrigued by the extent to which the boundaries between fantasy and reality were blurred in Edith Thompson's mind. As well as being a successful career woman with a good head for business, she was an Emma Bovary figure capable of losing herself in countless romantic novels. Her imaginary escapes from an unfulfilling marriage and the boredom of everyday life might never have translated into reality, if Frederick Bywaters had not appeared. He seemed to offer everything that Edith's husband had failed to deliver, and Edith grabbed the opportunity. In *Criminal Justice: The True Story of Edith Thompson*,⁵ I argue that in the course of her relationship with Bywaters, Edith Thompson's tenuous grip on vital distinctions between reality and imagination

slipped altogether. Not only did she discuss the fates of heroes and heroines as if they were real people, but she began to fantasize along similar lines about ridding herself of her husband. Rather than seeking a divorce, Edith Thompson preferred to toy with thoughts of her husband's death.

Her claims to have attempted to kill him, specifically with poison and glass, were demonstrated by the Crown's own pathologists to be false. I interpreted these protestations as rhetorical flourishes, a way of assuring Bywaters that she would go to any length to prove her love for him. Imaginary murder, it appears, seemed preferable to the real social stigma and difficulty of divorce. To the extent that Edith Thompson failed to walk out on her marriage and set up home with Bywaters, she was a prisoner (probably) of her temperament, and (certainly) of her class and time.

Whether or not her declared intent to kill her husband influenced Bywaters's murder of Percy Thompson late one night in Ilford has been debated ever since Edith Thompson and Freddy Bywaters were jointly charged with murder. I argued that the two were not linked, and that Bywaters had begun to drift away from Edith Thompson in the months before the murder. I maintained that Edith Thompson was innocent of the charges brought against her, and that she was the victim of a moral climate that cast her as the sirenlike temptress of a young, infatuated hothead.

Criminal Justice is anchored in a contextual reconstruction of Edith Thompson's life, from her primary school records to a study of the books and plays she read and saw. I analysed the newspapers of the period, and I gained access to closed Home Office and Prison Commission files on the case. At the time of my research in the mid-1980s there were still people living who had known the protagonists of the story (one of them was Bywaters's best childhood friend). They shared their memories and their photographs of Edith, Freddy, and Percy with me. This enabled me to flesh out their story in ways that are acceptable, and indeed expected, in a biography. By exploring the locations in which Edith and Freddy grew up I could, for example, establish that on the night of the murder Edith and Percy Thompson returned to their home on the usual and most direct route, an important point in view of the statements in court to the contrary. My narrative strategy was to offer a prospective, day-by-day account, which took the shape of a narrative 'diary' for the eighteen months of Edith Thompson's involvement with Bywaters.

Part 1 Anatomy of a *cause célèbre*

WILLIAM TWINING

The facts

About midnight of Tuesday/Wednesday, 3/4 October 1922, Percy Thompson and his wife, Edith, were returning from a visit to a West End theatre to see a Ben Travers farce. They were within a hundred yards of their home in Kensington Gardens, Ilford, when a man in a raincoat and hat came from behind them, pushed Mrs Thompson aside, and approached Percy Thompson. After a struggle Percy Thompson collapsed

on the pavement fifty feet further on and the man ran away. Edith's voice was heard by a neighbour crying, 'Oh, don't; oh, don't.' Shortly afterward she ran up to a group of people, also returning from Ilford Station, and cried out, 'Oh, my God! Will you help me; my husband is ill, he is bleeding.' When a Dr Maudsley arrived from a nearby house some five to eight minutes later, he found that Percy Thompson was dead. He had been propped up against a wall by his wife. Mrs. Thompson was in a confused and hysterical condition. When told that Percy was dead, she said: 'Why did you not come sooner and save him?' Blood was gushing from the mouth of the deceased, but it was only after he had been taken to the mortuary that several knife wounds were found in his body. There were several slight cuts in the front of the body and two deep stab wounds in the back of the neck.

When the police called at the Thompsons' house at 3 a.m. Edith Thompson was in a very distressed state. She said that all she knew was that her husband dropped down and screamed out, 'Oh.' She said that she had thought that it was one of his attacks. She denied that either she or her husband had a knife. The following morning the police learned of Edith's friendship with a young merchant seaman called Frederick Bywaters and, having found out that he had spent the evening with Edith's parents, the Graydons, some two miles from the scene of the crime, the police detained him for questioning at 6 p.m. on 4 October. In Bywaters's room in his mother's house they found two notes, five letters, and a telegram, all from Edith Thompson. Bywaters made his first statement, after caution, denying both knowledge of the crime and owning a knife. Mrs Thompson was arrested on the evening of the same day. On the following day she was shown some letters from her to Bywaters. She then made a statement in which she denied seeing anyone at the time her husband fell; she acknowledged her relationship with Freddy Bywaters, admitting that they had corresponded on affectionate terms. Immediately after making a statement she was taken past a room in which she saw Bywaters. She said, 'Oh God, Oh God, what can I do? I did not want him to do it.' After caution, she made another statement in which she said that on the night of the incident a man had rushed out and pushed her away. She saw the man and her husband scuffling. She recognized the man as Bywaters by his coat and hat. Bywaters made a further statement on 5 October, after being told that he and Edith Thompson were to be charged with murder. He admitted to killing Percy after a struggle. 'Mrs Thompson must have been spellbound for I saw nothing of her during the fight.'

The police found the murder weapon, a knife, on 9 October, as a result of statements made by Bywaters. On 12 October, they found a box on Bywaters's ship, the SS Morea, containing sixty-two letters and telegrams from Edith to Frederick, together with fifty clippings from newspapers enclosed in the letters, and a photograph of Edith. A number of the cuttings dealt with murder, mainly by poison. Three letters from Bywaters to Edith were found at her place of work. More than half of the letters and a selection of the cuttings were put in evidence by the prosecution. Much of the interest of the case centres on Edith's letters and the cuttings, which constituted the main, but not the only, evidence against Edith.

It is universally accepted that it was Bywaters who killed Percy Thompson. It is also not disputed that Edith and Freddy were lovers and that they both had a *prima facie* motive for killing Percy. Freddy pleaded not guilty on the ground that he had killed Percy in self-defence. Since Percy was unarmed at the time, it is hardly surprising that this defence failed. The interesting question was whether Edith was also guilty, either on the ground that she incited Freddy to kill Percy or that they jointly planned to kill him. It is clear from the letters that Edith and Freddy had been lovers for nearly two years; that Edith was very unhappy; that she wished to end her marriage; and that she had expressed the view that she would not be sorry if Percy were dead.

Edith Thompson and Frederick Bywaters were tried at the Central Criminal Court on 6–11 December 1922. They were both charged with the murder of Percy Thompson, Bywaters as principal, Edith as a principal in the second degree, because she was present at the killing. A second indictment containing a number of counts, including charges against Edith of administering poison and broken glass with intent to murder, was not proceeded with. The jury found both accused guilty, after barely two hours' deliberation. They were sentenced to death; ten days later the Court of Appeal rejected their appeals; and, on 9 January, three months and six days after the death of Percy, Bywaters and Thompson were hanged.

The full transcript of the trial has been published in the 'Notable British Trials' series;⁶ this includes all the evidence presented in court, together with a complete transcript of letters from Edith Thompson that were not put in evidence at the trial and the judgments of the Court of Criminal Appeal in the case (two appeals). We thus have available to us what Wigmore called 'a mixed mass of evidence'. This includes statements made by the two accused, the testimony of witnesses who were nearby at the time or immediately after the attack, and a limited amount of circumstantial evidence – including the report of the famous pathologist, Sir Bernard Spilsbury, that there were no traces of either glass or poison discovered in the post-mortem examination. The exhibits included the murder weapon, three letters from Freddy to Edith, and a selection of Edith's letters to Freddy. There is also the evidence given by both accused at the trial. Some additional information not given in evidence at the trial will be ignored for present purposes. I shall concentrate on those of Edith's letters that were put in evidence, but it is worth mentioning briefly that the other evidence establishes beyond reasonable doubt that it was Freddy who killed Percy; that there is almost nothing to support, and a good deal to confute, Freddy's claim that he acted in self-defence; that under cross-examination Edith admitted that she wished to give Freddy the impression that she had tried to make her husband ill; and that, although the testimony of both accused is an important aid to interpretation of some passages in the letters, there is little outside the letters to support the prosecution case and nothing that might be taken as determinative or dispositive in regard to the other main theories. Accordingly, let us treat the letters as the main evidence against Edith and consider the evidence presented at the trial as supplementary.

A striking feature of the extensive secondary literature about the case is that the commentators have been almost equally split on the question of Edith's guilt. By and large these works belong to the literature of popular entertainment, although some are very competent examples of this particular genre – carefully researched, often perceptive, usually readable. Since the main objective is to arouse interest or to make a case, detail tends to be sacrificed to readability and more emphasis is placed on amateurish psychological speculation than on the more mundane aspects of meticulous analysis of evidence.

What can a more scholarly or scientific approach add to our understanding of a complex case such as this?

Modified Wigmorean analysis

In this case study I shall apply a modified version of Wigmore's chart method of analysing evidence. The original method is described above in chapter 1.⁷ Here it is modified in three ways: First, only limited use will be made of symbols and charts.⁸ Secondly, clarification of standpoint will be treated as an essential ingredient in macroscopic analysis of the case as a whole. Thirdly, there will be much more emphasis on the idea of 'theories' of the case.

The analysis will involve the following steps:

- (a) clarification of standpoint;
- (b) definition of the ultimate probanda;
- (c) outlining of the four main theories of the case, with some variant subtheories, stories, and themes;
- (d) testing of one of these theories, by way of illustration, through detailed analysis of only two items of evidence: the facts about the knife and one passage in Edith's last letter (exhibit 60);⁹ and finally,
- (e) suggestion of some provisional conclusions on the basis of this partial analysis.

This will not resolve the mystery; but I hope it will show that even this selective and relatively straightforward exercise in analysis significantly narrows the possibilities and throws some light on the particular case and on some of the general themes that it illustrates.

Clarification of standpoint

The first step is to clarify the standpoint from which the analysis is to be undertaken. For present purposes, I shall adopt the standpoint of a historian in 1988,¹⁰ confronted with a finite body of data – the record of the trial – and concerned with answering the narrow question, 'Does the available evidence support beyond reasonable doubt the allegation that Edith Thompson was legally responsible for the murder of her husband?'

Adopting the standpoint of the historian enables us to pursue the truth about Edith Thompson on the basis of analysis of the available evidence (the data) without regard to the procedural complexities, multiple objectives, and 'noise' factors that

concern participants in actual trials.¹¹ However, in order to keep matters simple and to maintain a close connection with the actual trial, I shall impose two artificial constraints on our enquiry. First, I shall confine my analysis to the evidence in the trial record. A real historian normally would not accept such a limitation. Secondly, I shall concentrate on the single question whether Edith was guilty as charged. This question is, of course, by no means the only question about the case that might interest historians – but it is a standard one that is very close to the question posed to the jury in the case.

Framing the ultimate probanda

The next step is to identify the ultimate probanda – the material allegations on which our judgement of the case as a whole must rest. Historians have no concept of materiality.¹² They are free to frame their questions as they wish without formal constraints. When arguing in court about disputed questions of fact, lawyers have no such freedom. The questions arising from the indictment (or other pleading) are defined in advance by law. Where the law is clear this can greatly simplify the tasks of analysis and argument, for it lays down precise and fixed touchstones of relevance. Evidence is relevant if it tends to support or tends to negate the facts that must be proved beyond reasonable doubt. Where the law is unclear, however, the task becomes much more difficult.

With respect to Bywaters the law was clear enough. The prosecution had to prove beyond reasonable doubt that he had intentionally, with malice aforethought, and without lawful justification, caused the death of Percy Thompson. The only points in dispute were whether Freddy acted in self-defence or under immediate provocation. The jury apparently had no doubts on this matter; nor should it unduly trouble a historian. Bywaters's defence was that he accosted Percy to ask him to agree to a separation or divorce, the argument developed spontaneously into a fight, and he stabbed Percy in self-defence because he thought Percy was about to draw a gun. Two of the stab wounds were in the back and there was no evidence to suggest that Percy had a gun on this or any other occasion, nor that Freddy had any reason to think that he did. The evidence supporting provocation is almost as thin. It is not surprising that Freddy's story was not believed.

The case against Edith was less simple. She was charged as a principal in the second degree. What this meant was that the prosecution had to prove (a) that Bywaters murdered Percy Thompson, (b) that Edith was physically present at the murder, and (c) that she aided and abetted the murder. The first two requirements are relatively unproblematic, but the third contains the seeds of some genuine difficulties. Aiding and abetting, conspiracy, and incitement are three areas of criminal law that involve notorious problems of interpretation and application. In the trial and on appeal these difficulties barely surfaced, although a careful reading suggests that the trial judge took a much narrower view of the law than had been assumed by the prosecution or than the authorities at the time probably warranted. He directed the jury that they must be satisfied that Bywaters and

Thompson had planned this attack, an interpretation that was surprisingly favourable to Edith.¹³

In order to succeed on the charge of murder against both of the accused, the prosecution had to satisfy the jury that the truth of the following propositions had been established beyond reasonable doubt:

- 1 That Frederick Bywaters deliberately and with malice aforethought killed Percy Thompson; and
- 2 Either
 - (a) that Edith Thompson conspired with Frederick Bywaters to kill Percy Thompson, on this occasion or whenever opportunity arose; or
 - (b) that Edith Thompson intentionally incited Frederick Bywaters to kill Percy Thompson, and that
- 3 Bywaters acted in pursuance of the conspiracy or because of the incitement.¹⁴

These propositions were the facts in issue – that is, the material allegations that the prosecution had to prove beyond reasonable doubt in order to succeed. The test of relevance of any item of evidence in this case is whether it tended to support or to negate one of these propositions.

In order to convict Freddy it was sufficient for the prosecution to prove the first proposition only. As we have seen, this was not difficult. Although it was relevant to prove intent and motive to show that this attack had been planned or that there had been earlier attempts by either or both of them to kill Percy, these were not strictly necessary for the prosecution's case. At the trial there was no dispute about the cause of death or the identity of the killer; it was not even necessary for the prosecution to show that the attack was premeditated, as they claimed, so long as they established that it was intentional.

The case against Edith was more complex. In order to succeed, the prosecution had to show that Bywaters was guilty of murder (proposition (1)) and that (proposition (2)) Edith had either planned Percy's death with Freddy or had been responsible for inciting Freddy to kill him, and that (proposition (3)) Freddy acted because of the conspiracy or incitement. In argument the prosecution, while presenting a story of continuous incitement leading to an attack that had been planned in advance, rather blurred the distinction between incitement and conspiracy – not surprisingly, for either was sufficient.¹⁵ Mr Justice Shearman, however, in his charge to the jury implied that they should convict Edith only if they were satisfied that this particular attack had been planned in advance. There is an ironic contrast between the unequivocal sententiousness of tone of the judge's charge and his insistence that Edith should be convicted only on the basis of what I hope to show is by far the weakest of the possible theories of the case that are consistent with her guilt.

The judge exuded generalized disapproval, indicating his belief in her guilt, but then analytically posed the issue in such a way as to make conviction of Edith much more difficult, at least in theory. If, as seems likely, both the jury and nearly all

subsequent commentators reacted more to the general attitude of the judge than to his precise words, that is doubly ironic.

Theories of the case as a whole

The next step is to consider, from the point of view of an historian, the range of tolerably plausible hypotheses about the case as a whole, and the general lines of argument for and against each hypothesis – what we may conveniently refer to as the main theories of the case. The aim here is to provide a broad framework of competing general hypotheses and strategic arguments within which all the relevant evidence can be organized and weighed.

In adversarial criminal proceedings the prosecution typically presents its case against the accused in the form of a coherent story of what happened.¹⁶ In order to succeed the prosecution must prove each of the material allegations beyond reasonable doubt. Typically, but not necessarily, this involves persuading the trier of fact to accept their account of the story as a whole. The theory of a case is an internally consistent collection of hypotheses that form a coherent argument, which supports the story.

In order to counter the prosecution's case the defence has three main options available to use either independently or in combination: to deny the prosecution's story, either totally or in some material particular(s), without offering an alternative (e.g. by submitting that there is no case to answer); to explain away the prosecution's story (e.g. by admitting most of the hypothetical facts, but interpreting them in a manner consistent with the innocence of the accused – Freddy admitted killing Percy, but claimed that it was in self-defence); or to present a rival account of what happened with respect to one or more material facts (e.g. by presenting an alibi). In practice many defences involve a combination of all three strategies, but sometimes these are incompatible with each other.

A theory in this sense relates to the case as a whole. It can serve a number of functions: it helps to organize the material; it provides a basis for selecting some of a mass of potentially relevant evidence for inclusion or emphasis – a subsidiary test of relevance; it may serve to fill in gaps in the available information with more or less plausible hypotheses; and it provides a general basis for testing internal coherence and consistency. From the point of view of counsel, each side's theories provide a strategic framework that guides, and often determines, many specific tactical choices.

In trials, when there are disputed questions of fact, the trier of fact is usually being asked only to do one of two things: to select between competing theories of the case, or to assess whether, on the basis of the evidence presented, the proponent has proved his or her version to the applicable standard. Historians do not have the law's elaborate devices for guiding decisions in situations of uncertainty in adversary proceedings; they do not have concepts such as materiality, conclusive or rebuttable presumptions, standards of proof, or burdens of proof or production.¹⁷ However, the notion of competing theories or accounts fits a dialectical view of historical enquiries into truth. One way of proceeding is to test a series of competing

hypotheses against the available evidence and to select the most plausible one. In the present context, a series of alternative theories of the events in *Bywaters and Thompson* serves much the same function as they would in a real trial. Part of the interest of the present case is that, even at this general or strategic level, there is room for considerable doubt and disagreement.

Four theories of the case

To simplify matters, of the many different theories about the case which can be advanced, each with possible variants, let us outline four main theories, two favouring the prosecution (or the thesis that Edith was guilty as charged), and two favouring the defence.

- 1 *The conspiracy theory*: This particular attack was planned by Edith and Freddy on the day before. Freddy set out carrying a knife with the intention of killing Percy as the Thompsons returned home from the theatre. Edith expected this attack because she had planned it. In most versions of this theory Edith was the mastermind, Freddy the instrument. The actual attack was the culmination of a long series of attempts to kill Percy. This was one of the theories advanced by the prosecution and the one that was emphasized by the judge in his charge to the jury. An important variant of this theory is that Edith and Freddy had agreed to try to kill Percy whenever opportunity arose, but that Edith had not necessarily planned or expected this attack.
- 2 *The incitement theory*: Edith may not have known of or expected this attack, but she had over a long period deliberately tried to persuade Freddy to kill her husband – working on him by direct incitement, by innuendo, by suggesting different ways of getting rid of Percy, and by claiming (whether truthfully or not) that she was prepared to risk trying to kill him herself, and that she had indeed made several unsuccessful attempts to do so. There was, in short, a protracted and continuous incitement of Freddy by Edith to get rid of her husband. The particular timing and method of the attack were immaterial; Edith deliberately influenced Freddy to kill Percy. One variant is that there was some specific act of incitement that influenced Freddy on this occasion.
- 3 *The fantasy theory*: The attack on Percy probably was unpremeditated and certainly was totally unexpected so far as Edith was concerned. At no stage had Edith tried to kill her husband; nor had she deliberately, recklessly, or even inadvertently incited Freddy to do so. In this view many of the key passages had an innocent explanation, and even the potentially most damaging statements merely represent the outpourings of a vivid imagination and were so interpreted by Freddy. When Edith wrote to Freddy she entered a world of daydreams and make-believe, and nothing that she said constitutes evidence of intent to kill or to incite Freddy to kill in the real world. Her letters were, as Freddy unromantically put it, mere ‘melodrama’. A variant is that although some of the passages are to be interpreted as references to attempts to kill Percy, they were merely part of a game, possibly a sexual game, designed to give spice and excitement to their relationship – and, again, this is how they were interpreted by Freddy.
- 4 *The broken chain theory*: This theory denies any connection between Edith’s behaviour and Freddy’s act. At one or more points the alleged chain of connection is broken. The

theory takes two main forms: one version consists of a straight denial of one or more key points in the prosecution's theory or theories without advancing an alternative account of what happened. An obvious example is a denial that the attack was premeditated. An alternative version is to present a rival account of the attack (and of preceding events), which serves the same function. For example, Edith lived in an imaginary world of passion, daring actions, and desperate measures, a world in which fact and fiction and fantasy were inextricably mixed. She gave full rein to her imagination in her letters, pretending, perhaps even imagining, that she had tried to kill Percy. All the possibly damaging passages are in the earlier letters, which represent a particular phase in her relationship with Freddy. In this view it is unnecessary to reach any firm conclusion as to what these passages might mean – whether, for example, she was claiming (truthfully or not) to have put broken glass in Percy's food. Even if the most damaging interpretation is put on the key passages relating to incitement, conspiracy, and attempted murder there is no sufficient connection between the actual killing and the letters because of one or more of the following: (a) Freddy did not take them seriously; (b) the relationship had entered a quite different phase in the period before the killing; all the passages that might bear a damaging interpretation were written six months or more before Percy's death; or (c) the actual attack was spontaneous rather than premeditated. Any one of these is sufficient to break the connection between Edith's letters and Freddy's act.¹⁸

To recapitulate briefly: the conspiracy theory suggests that this attack was either planned shortly before by both of the accused or was the culmination of a more general plan; the incitement theory suggests that this attack, regardless of whether it was planned or premeditated, was the direct result of a continuous and protracted campaign of incitement by Edith; the fantasy theory suggests that all the potentially damaging passages in the letters are either open to alternative, innocent interpretations or were merely figments of Edith's heated imagination, and were interpreted by Freddy as 'melodrama'. The broken chain theory suggests that whatever interpretation is put on the letters, there was no direct connection between the killing of Percy and the letters (or Edith's other actions).

It is worth making some points about these general theories of the case. First, they are not all of the same kind. The first three each involved advancing a coherent account of what happened – constructing an integrated story that hangs together as a whole. So does the second version of the broken chain theory. There is scope for a few loose ends or ambiguities or gaps, but the overall plausibility or credibility of each theory depends in part on its internal coherence. Does the story *as a whole* form a unity and fit the available evidence?

The first version of the broken chain theory lacks this positive quality. Essentially it consists of a series of negative assertions about key elements in the other theories. It does not necessarily involve constructing an internally consistent story about what happened. One of the notable features of the trial is that, contrary to the strong advice of her counsel, Edith Thompson insisted on going into the witness box. This had several catastrophic results. It gave the prosecution the opportunity to extract some

damaging admissions from her in cross-examination; and she had to advance a single coherent account of what happened and to give her interpretation of key passages in the letters and to have these positive assertions challenged by the prosecution. She thus gave the prosecution a specific target to attack and made it difficult for the defence to cumulate doubt about different elements of the prosecution's case. The broken chain theory allows what amounts to a series of arguments in the alternative along such lines as these:

- 1 None of the relevant passages in the letters supports the view that Edith either tried or pretended to try to kill her husband.
- 2 Even if she had tried, the chain is broken because Freddy did not believe her.
- 3 Even if Freddy believed her, the chain is broken because he did not act on that belief at the time and there is no evidence of a connection between the letters and his behaviour on the night.
- 4 The evidence does not support the proposition that the attack was premeditated – that Freddy set out with the intention of attacking Percy; but even if the attack was premeditated the evidence does not support the contention that Edith had inspired Freddy's plan.

By giving evidence, Edith Thompson gave the jury a chance to choose which of the two competing stories they found to be plausible, rather than to judge whether each of the key elements in the prosecution's case was established beyond reasonable doubt on the basis of the evidence. Or again, instead of arguing that a particular passage might mean A or B or C or D rather than E, as the prosecution suggested, the defence was committed to giving a single interpretation to each key passage and to having that interpretation challenged. Almost all commentators agree that it would have been much more difficult to convict Edith if she had not given evidence.

Of course, historians do not have the option of deciding not to call a witness. That is a matter of legal procedure. However, the broken chain theory could well provide a sufficient answer to our historian's question. For if one or other version of that theory is accepted as correct, according to whatever standard is thought appropriate, then it establishes that Edith was not guilty as charged.

Each of these theories is a sketch of a complex argument. I have noted only some of the more obvious variants of each of these four main lines of argument. The range of possibilities is immense. There is considerable potential overlap among several of them. Enough has been said to illustrate how, even at this stage of general strategy, judgement and choice are unavoidable in constructing and criticizing this kind of argument. There is nothing mechanical about the art of analysing evidence. This is one reason for doubting Wigmore's claim that his chart method 'is the only . . . scientific method'.¹⁹

Experience suggests some useful working rules of thumb in exercising the art of analysis at this strategic stage:

- 1 '*Strategy first, tactics later*': Despite the kinds of complexities that have been illustrated, strategic theories are powerful simplifying devices: they are a means of structuring, managing, and selecting material, however extensive and complex it seems.
- 2 '*Proceed dialectically*': The historian and the lawyer need to recognize the weak as well as the strong points in their own and rival theories.
- 3 '*Construct the strongest version that you can of each theory and identify its weakest points*': What constitutes strength may, of course, be rather different for a trial lawyer and a historian.
- 4 '*Go for the jugular*': That is to say, select one or two or a few key points in an argument and concentrate on those.

Such precepts are commonplaces of advocacy and, perhaps less explicitly, of analysis of evidence by historians and others. They are essentially heuristic techniques for making complex problems more manageable. All presuppose a reflexive view of the process. One cannot construct theories, judge their strength, and identify key points without regard to detail. On the face of it the advice may seem to suggest moving from the general to the particular; in fact, familiarity with the particular is almost always a precondition for clarifying the general.

Sub-theories, sub-plots, and characters

Each theory is dependent to a significant degree on one or more sub-theories. First, an assessment of Edith's character, or at least some important aspects of it, is relevant to each of them. For example, the fantasy and incitement theories depend very largely on the view one takes of Edith, and a view of her character is relevant, though less important, to the conspiracy theory. It is not so important to the first version of the broken chain theory, which depends much more on an interpretation of Freddy's likely reactions to the letters and whether the attack was spontaneous or premeditated. Here the focus is more on Freddy, but an assessment of Edith's character is important for all the theories, both as an aid to interpreting the letters and as part of interpreting the nature and course of their relationship. For example, both Edith and Freddy claimed that the phrase 'only three and three quarter years left' in Edith's very last letter (exhibit 60; see appendix 2) referred to a suicide pact. That phrase is relevant to all four theories. Whether there was in fact such a pact, whether Edith had suggested it but Freddy had not taken it seriously, or whether this is an example of Edith's alleged fantasizing depends in part on one's views of Edith's and Freddy's characters, in part on one's view of their relationship, and in part on other evidence (e.g. other passages ostensibly referring to the same topic).

The main facts about the three principal protagonists and of their relations with each other are not seriously disputed. However, there is room for different interpretations of their characters (especially that of Edith) and of Bywaters's attitude toward Edith at the time of the killing.

Percy Thompson had married Edith Graydon, who was four years his junior, in January 1916. There were no children of the marriage. Percy appears to have been

a steady, respectable, dull, and not particularly successful shipping clerk. There is evidence that he was suspicious and jealous of Edith's relations with Freddy. She expressed fears that he would be violent and there is some evidence that he assaulted her on at least one occasion. She speaks of 'submitting' to him sexually on a number of occasions, but also of refusing him without repercussions.

Edith Thompson had a striking personality. The undisputed facts about her include the following: she had worked as a bookkeeper and manager for a wholesale milliner's in Aldersgate for several years and was well-regarded by her employers. She earned slightly more than her husband. She had several male admirers in addition to Freddy, but there is nothing to suggest that she had had extramarital sexual relations with anyone but him. At the time of the murder Percy Thompson was thirty-two, Edith twenty-eight, and Freddy twenty. It is clear that Edith's marriage to Percy was not happy; it is less clear what price she was prepared to pay to escape from the security, comfort, and respectability of her domestic situation. We have plenty of material on which to base judgements about Edith Thompson's character, but it is open to a variety of interpretations.²⁰

Frederick Bywaters has been described as 'a clean-cut, self-possessed, attractive-looking youth of twenty, with a good character and record'.²¹ He had gone to sea before he was sixteen, and at the time of the murder was variously described as a ship's writer, a clerk, and a laundry steward. During the period of his relationship with the Thompsons he was at sea for well over half of the time, and this was the occasion both for the protracted and intense correspondence between Freddy and Edith and for the possible fluctuations in their relationship. During the trial he instructed his counsel to conduct the case so as not to prejudice Edith's chances of acquittal. This won him a lot of sympathy from public opinion, as reflected in the popular press, but it may possibly have damaged Edith's case, as he appeared as the dignified, loyal lover, whereas she was seen by some to be solely concerned with saving herself.

The variety of interpretations of Edith's character to be found in the literature is both fascinating and bewildering. The prosecution, backed by the judge and seemingly by the Home Secretary and most public opinion, saw Edith as an immoral, scheming, manipulative older woman – a sorceress, who insidiously and persistently worked on an impressionable, inexperienced younger man to kill her husband or to help her kill him. Other writers have compared Edith to Madame Bovary, and even to Marilyn Monroe. What these various interpretations have in common is that they are highly speculative, confidently asserted, impressionistic judgements by amateur psychologists. There are passages in the letters taken singly that can be used to support each of these and no doubt many other interpretations. Nowhere in the literature is there any attempt to build up a careful picture of Edith's personality and behaviour on the basis of considering the evidence as a whole using any method other than impression.²² It may be possible for psychologists (or psycho-historians) to construct a less speculative profile of Edith on the basis of the available evidence.

Another sub-theory concerns Freddy's character, which, apart from points already mentioned, is relevant to assessing his credibility as a witness and to the question of whether the attack was premeditated or spontaneous (crucial to all but the fantasy theory, important for the broken chain theory, and relevant to the other two).

Some sort of picture of the nature and course of the relationships between the main actors is also relevant at least as background to all the theories of the case; it is crucial to parts of the broken chain theory, which is greatly strengthened if one can show a cooling off on the part of Freddy after the most damaging letters were written (there is quite cogent evidence in favour of this) and a calmer, less frenetic reaction on the part of Edith. However, even if it were accepted that at one stage Freddy had tried either to break off or to cool down the relationship ('Can we be pals, only,' he had suggested in September), there is a counter-theory, to the effect that there was a revival of passion later, backed not least by the fact that Freddy killed Percy. Without going further into detail here I wish to suggest that in order to assess the credibility of the broken chain theory *in toto*, and responses to it, it is important to consider in meticulous detail the precise nature of the relationship at a number of stages in the story and to test the hypothesis that the early letters belong to a distinct phase that was significantly different from the state of the relationship in the days immediately before Percy's death.

Macroscopic analysis: a preliminary stock-taking

One of the main claims made for Wigmore's method is that it provides a powerful tool for organizing and mapping complex arguments based on mixed masses of evidence. The guiding rule of thumb is to begin with the conclusions (the ultimate probanda, facts in issue) and to work down or back to the evidence. The ideal type of an argument of this kind is pyramid-shaped, with the apex being simpler than the base. In adjudication, there is typically only one apex (guilty/not guilty; liable/not liable), but usually multiple facts in issue are involved; these are the 'ultimate probanda'. It is almost always essential to define each fact in issue before proceeding to analyse the evidence relevant to it.

At first sight, the preliminary stages of the analysis of the case of Edith Thompson may not seem to be a good advertisement for Wigmorean analysis as a simplifying device. The first stages have not been simple, but this is due to the nature of the case rather than the method.²³ The case is usually considered to be complex because of the volume of the evidence and the difficulties involved in interpreting Edith's letters. The first stage in our analysis has revealed a number of further complications.

First, the ultimate probanda are more than usually complex. Many famous trials involve ultimate probanda in which the prosecution had to prove $A + B + C + D$, when only one element (e.g. identity or criminal intent) has been the subject of serious doubt or dispute. In the case of Edith Thompson, the facts in issue exhibit

a more complex form: the prosecution's case involved a mixture of necessary and sufficient conditions that can be represented as follows:

A (Freddy murdered P) + B {(i) or (ii) or [(i) or (ii) or possibly (iii)]}.²⁴

Secondly, some doubts surrounded the law governing the facts in issue: Was it sufficient to prove a general conspiracy to murder Percy (B (i)), or did the prosecution have to prove that this attack was planned? What precisely is the scope of the proposition 'E *incited* F'? Is the scope of 'incitement' a question of law or of fact, or of mixed fact and law? Furthermore, although it was not raised at the trial, would Edith be responsible if the prosecution established the 'exploding bomb' theory?²⁵ This merely illustrates the general point that to the extent that the interpretation or application of the governing law is unclear, the task of constructing or evaluating arguments about disputed questions of fact becomes correspondingly more difficult.

Thirdly, the complexity of the ultimate probanda is reflected in the multiplicity of potential theories of the case, each of which has variants. What this means is that there are several potential possible lines of argument both for and against Edith. A 'comprehensive' analysis of the case would need to map and evaluate each of these arguments.

Fourthly, some of the lines of argument overlap. For example, as we shall see, the fantasy theory may represent both a sufficient argument for exonerating Edith (with respect to both conspiracy and incitement) and a substantial prop for the broken chain theory. This is not uncommon in disputed cases involving multiple lines of argument.

Fifthly, in many *causes célèbres* the sole or main disputed issue relates to some relatively 'hard fact', such as identity or alibi or the death of the victim. In this case we are dealing with the mental state of not one, but two, people: Did Edith intend . . . etc.? Was Freddy's act caused/inspired/done in furtherance of Edith's incitement or plan? Proof of mental states is notoriously more elusive than proof of 'simple facts'.

Finally, as we have seen, some of the intermediate probanda that are potentially important in most of the theories involve interpreting the characters of, and the relationship between, the two main actors.

The case clearly illustrates how complications can arise at the top of the pyramid as well as at other points. Nevertheless, the first steps in the analysis have imposed some order onto the material. Our standpoint has been clarified; the range of potential ultimate probanda, albeit unusually complex, has been laid out; four main theories of the case have been articulated, with scope left for dealing with variants of these where appropriate.²⁶ We are now ready to proceed to the next stage.

Microscopic analysis: premeditation

All Wigmorean analysis involves selection; completeness and comprehensiveness are only relative matters in this context. However, the purpose of this essay is to illustrate the application of the method to a particularly complex case. Accordingly,

I propose to proceed highly selectively by concentrating on one small sector of potential arguments about the case as a whole.

First, let us look at just one element in the broken chain theory – the proposition (intermediate probandum) that ‘Freddy’s attack on Percy was spontaneous/unpremeditated’ and the main evidence used by the prosecution to support premeditation. I shall use this to illustrate a number of points about Wigmorean analysis (e.g. generalizations, prejudice, and the use of emotive language); but there is another reason for selecting this as a focal point. It is a maxim of advocacy that one should ‘go for the jugular’. If a reasonable doubt is established about the proposition that the attack was premeditated, it breaks the connection between Edith’s thoughts and actions and all the prosecution theories, except possibly the legally dubious and highly speculative ‘exploding bomb’ theory. This is one potential ‘jugular’ that could be sufficient to destroy all versions of the case against Edith. Regardless of whether the analysis achieves this result here – which I leave to the reader to judge – it illustrates the potential value of careful microscopic analysis of one or more key points in a highly complex argument the main outlines of which have been firmly set by careful preliminary macroscopic structuring.

Let us start, then, by constructing the strongest possible argument based on the available materials, that Freddy’s assault on Percy was unpremeditated. This sub-theory might be constructed in outline as follows:

- 1 Before Freddy set out from the Graydons’ he did not plan to meet Edith and Percy, his decision to do so was taken on the spur of the moment.
- 2 A planned murder would probably have (a) been carried out in the absence of Edith, (b) been executed without a struggle, and (c) been carried out in some other place.
- 3 Edith was genuinely surprised by the attack.
- 4 Freddy’s purpose in meeting Percy was to ask him to grant Edith a divorce. The stabbing occurred during an unexpected struggle when the confrontation misfired.
- 5 Freddy’s carrying of the knife was innocent.

All five props in this argument are consistent with Bywaters’ conviction for murder and the rejection of his self-defence theory. These five theses are separable, but can be combined in various ways. I shall concentrate on (5), which was treated as crucial in the case. Suffice it to say, in my judgement, that there is quite strong support for (3) and that there is little or nothing in the record to negate (1), (2), and (4), but there is little beyond Freddy’s story to give them direct support either, except some speculative generalizations that give weak support to (2) and (4).

To convict Edith, the prosecution had to establish not only that Freddy murdered Percy but also that the attack was premeditated. The two main props for the latter proposition are (a) that the carrying of the knife was not innocent, and (b) that there is clear evidence that this attack was planned. Establishing (a) or (b) or (a + b) beyond reasonable doubt would be sufficient for this purpose. Let us look at (a) and (b) in turn.

(a) The knife

Reconstruction of the actual arguments used at the trial with respect to the knife is particularly revealing. The prosecution's argument was, in effect, that Bywaters had purchased the knife with the intention of killing Percy and that he had put it in his overcoat pocket on the day of the murder for the same reason. The defence claimed that Freddy had bought the knife a long time previously, that he had taken it abroad with him on his last voyage, that he regularly carried it around with him, and that it was natural that he should do so. In the process of the arguments about premeditation, the weapon was variously described as an ordinary sheath knife, an English hunting knife, a deadly weapon, a dagger, a stabbing instrument, and a dreadful weapon. Interestingly, some of the more emotive terms were used by the judge.

There were also some striking differences in the generalizations invoked in the context of considering this issue. Counsel for the prosecution suggested that possession of a knife of this kind is in itself suspicious. In order to cast doubt on the suggestion that Bywaters had possessed the knife for some time, the prosecution suggested that if this were true 'it would have been a subject of jocular remarks'; the judge said, 'It is suggested that no reasonable man living in London carries a knife like that about in his pocket.' Defence counsel, on the other hand, in the course of a single paragraph said, 'It is not strange for a sea-faring man, visiting foreign countries, to purchase a knife,' and 'There are few sailors who do not possess a knife.'²⁷ The editor of the record in the 'Notable British Trials' series commented on the last remark in a footnote: 'Bywaters was not a "sailor" in the technical sense. He was a clerk on board a ship, and had more use for a fountain pen than for a knife.'²⁸

In the preceding examples not only is Bywaters variously categorized as a sailor, a seafaring man visiting foreign ports, a clerk, and a man living in London, but quite different generalizations are also invoked about the purchase, possession, and carrying of knives. At the trial the jury had the opportunity to inspect the knife itself and thus could form their own judgement on its description and on the specific issue of whether it would fit conveniently in the pocket of Bywaters's coat. They could also check the accuracy of the various categorizations of Bywaters: for example, it is arguable that he was both someone living in London and a seafaring man, who visited foreign countries, but the jurors were probably only slightly better placed than the modern reader for making confident judgements about the contemporary habits of merchant seamen or ships' clerks with respect to knives or to the likelihood that if someone possessed a knife of this kind for a considerable period it would be the subject of jocular remarks.

The example of the knife in Bywaters and Thompson is a simple example of the leeway for choice in selecting and formulating generalizations as part of an argument about a particular issue of fact. It shows how there is room for the use of emotive terms, for distortion, and for selection by emphasizing different aspects of the same situation. Moreover, it is an example of invoking commonplace generalizations – such as those about the normality of carrying knives about London and of sailors possessing and carrying knives – about which the jury is expected to rely on its

own version(s) of 'general experience' in order to come to a conclusion. Clearly there is scope in this kind of context for the intrusion of bias, prejudice, and sheer speculation. Moreover, it is doubtful whether all the relevant background knowledge can ever be fully articulated. However, as Wigmore might have argued, what better basis is there for making such judgements?

The date of purchase of the knife and the issue of whether Freddy was carrying it with the purpose of attacking Percy were perceived by the main participants to be significant. Almost all the available information about it can be gleaned from the explicit arguments advanced in the case. To this can be added a few further propositions. Mr H. W. Forster of Osborne and Co., tool merchants of Aldersgate, testified that his business sold identical knives for six shillings and had stocked them for about seventeen years. Neither the defence nor the prosecution attempted to adduce evidence corroborating or negating Bywaters's statement that he had purchased the knife in November 1921 – that is, almost a year before the attack. If the defence had managed to find one or two of Bywaters's shipmates who would testify that he had owned a knife for a long time and that he regularly carried it about with him, this could have significantly strengthened Edith's case.

A key-list of propositions relating to the propositions that (a) the purchase and (b) the carrying of the knife were both innocent, based on the available evidence, and constructed from the point of view of a relatively detached historian, might read as follows:

The purchase of the knife was innocent. The carrying of the knife was innocent.

- 1 The knife was bought in November 1921.
- 2 Freddy Bywaters (testimony, 53).
- 3 Freddy Bywaters carried the knife everywhere in England.
- 4 Freddy Bywaters (cross-examined, 71).
- 5 It was handy at sea and handy at home.
- 6 Bywaters (70).
- 7 Bywaters bought the knife from Osborne and Co.
- 8 Knives of this kind were sold by Osborne and Co.
- 9 Such knives had been stocked for about seventeen years.
- 10 H. W. Forster (director of Osborne's) testified to points 8 and 9 (42).
- 11 Defence called no witness to corroborate Freddy's possession of knife since November 1921.
- 12 Shearman J (137).
- 13 'It was difficult to put the knife into any kind of pocket, except the side pocket.'
- 14 Shearman J (137).
- 15 Generalizations about the normality of carrying such a knife about.
- 16 Ancillary evidence about Bywaters' credibility.

Prima facie this key-list adds little to the arguments presented in the case. However, it can be used as the basis for some other propositions that further weaken the premeditation thesis:

- 17 There is no evidence that Freddy Bywaters bought the knife on the day of the killing.
- 18 If Bywaters already owned the knife (1 + 17), he had it with him when he left home.
- 19 Bywaters carried the knife about with him from the time he left home until after the killing.
- 20 Bywaters had the knife on him during at least three social engagements (morning coffee and afternoon tea with Edith; visit to the Graydons).
- 21 The knife fitted easily in his coat.

All of this helps to bolster Freddy's claim that the purchase and carrying of the knife were both innocent. Furthermore, (17) suggests that the premeditation thesis requires that Freddy had formed the plan to attack Percy before he left home. Yet none of the several witnesses who saw him during the course of the day observed anything strange or unusual about his demeanour. The net effect of all this, I would suggest, is to give some (albeit weak) support to this part of Freddy's story; it suggests that there is nothing in the evidence about the knife (other than the fact of its possession and use in the killing) that supports the premeditation thesis.

For the prosecution to convict Edith, they had to prove that Bywaters's attack was premeditated. Even if one totally discounts Freddy's evidence about the events of the evening (and his story of the period up to 11 p.m. was generally consistent and was largely corroborated by the Graydons), there is almost nothing to support the proposition that the attack was premeditated. There was no evidence to support the proposition that the knife was purchased recently in order to attack Percy; there was no evidence in support of the proposition that Bywaters put the knife in his pocket that morning because he planned to attack Percy – the best that the prosecution could do was point out that there was no corroboration for his claim that he was in the habit of carrying it. The alternative hypotheses about his state of mind (planned attack, loss of control in the heat of the moment) are essentially speculative. The evidence relating to the wounds may support an inference of intent, but it is about evenly balanced (and weak) with respect to the question of premeditation versus spontaneity. More information about the date of purchase of the knife, whether Bywaters did regularly carry it about, and its size in relation to the pockets of the overcoat might have helped one side or the other. However, on the basis of careful scrutiny of the available evidence, my conclusion is that it gives only weak support to either side and, on balance, it marginally favours Edith. We are left with little more than speculative generalizations that point in different directions.²⁹ Accordingly there is considerable doubt about this crucial aspect of both prosecution theories.

(b) Edith's last letter: the 'tea-room' passage (exhibit 60; see appendix 2)

The other specific prop of the premeditation thesis was the closing passage in Edith's last letter to Freddy. In presentation, the prosecution did not subject this to close scrutiny, preferring to concentrate on building up a general impression of a continuous process of encouragement and stimulation ('by precept and example,

actual or simulated'). Edith incited Freddy and plotted Percy's death with him and this led directly to Percy's death. In the case, Edith's letters were admitted as evidence of motive and intent but were used for other purposes, including as direct evidence of conspiracy. Since the judge ruled that it was necessary to establish that Edith incited or planned this attack, the last letter in fact formed a crucial part of the prosecution's case.

I shall argue that the letter at most gives only very weak support to the prosecution and that there is almost no other evidence to support the proposition that this attack was planned. It is worth subjecting one key passage to detailed scrutiny as an illustration of the potential methods and value of microscopic Wigmorean analysis.

There is some uncertainty about when this letter was written and when it was received;³⁰ let us, for the sake of argument, take the timing most favourable to the prosecution: that it was written on the day before the killing (that is, on 2 October) and received before Freddy left his mother's house on 3 October. It is reproduced in full in appendix 3. The whole letter was the main evidence used by the prosecution in favour of the conspiracy theory. Let us focus on the following words, on which both sides relied to support their case: 'Don't forget what we talked in the Tea Room, I'll still risk and try if you will – we only have $3\frac{3}{4}$ years left darlingest. Try & help.' The prosecution theory was that 'what' referred to killing Percy; the defence claimed that 'what' referred to Freddy's trying to find Edith a post abroad so that they could elope.

If, from the standpoint of a historian, we take a fresh but careful look at this passage, it is clear that it is susceptible to quite elaborate textual analysis. Here I shall only sketch a possible approach. One might, for example, start by listing a series of propositions about possible referents of 'what' (also of 'risk and try', 'try and help' – risk what? try what? – (and so on) as follows:

- 1 'What' could refer to almost anything (i.e. there is no clear referent).
- 2 'What' could refer to killing Percy.
- 3 'What' could refer to getting a post abroad.
- 4 'What' could refer to eloping.
- 5 'What' could refer to a secret assignation.
- 6 'What' could refer to asking Percy for a divorce.
- 7 'What' could refer to a general conversation covering several or all of the above and possibly much else besides.
- 8 'What' could refer to whether to use poison or a dagger (Shearman, 151).

This probably covers the main possibilities, though the list is not exhaustive. There are a number of potential aids to interpretation that might give support to one or more of these hypotheses and eliminate others. Such aids include the immediate context of these twenty-seven words; the context of the letter as a whole; the context of the whole corpus of letters and of particular passages in other letters (e.g. Edith often uses the words 'risk' and 'try'); one or another sub-theory about the state of the relationship between Edith and Freddy; extraneous evidence from

people who saw (or possibly overheard them) in the tearoom; and the conduct of Edith and Freddy before and after the meeting. One might also investigate the occasion for writing the letter, and, of course, Edith and Freddy could be asked about the meaning of the passage.

Both the prosecution and the defence, in a very crude fashion, used something akin to textual analysis of the ‘tearoom’ passage in their arguments; but, in my view, they both cheated.

This passage is the main evidence in favour of the proposition that this attack was planned – that is, the particular conspiracy theory. The prosecution emphasized the words ‘risk’, ‘try’, ‘help’, and ‘only’ in the passage itself to bolster the idea that they referred to a sinister conspiracy. Then, by taking a number of other words and phrases out of context (‘great big things’, ‘he was suspicious’, ‘do something tomorrow night’) and linking them to the fact of Percy’s death and other letters, some of which were ambiguous and written more than six months before, they suggested that the conversation in the tearoom was the culmination of a continuing conspiracy.

The defense emphasized ‘only $3\frac{3}{4}$ years’ (strange if one were planning something immediate) and the fact that Edith and Freddy both testified that ‘what’ referred to eloping and risking her future with Bywaters; but then counsel used the fact of the prosecution’s misuse of this passage to cast doubt on their interpretation of all other passages, while carefully skipping over any explicit reference to any of the most damaging ones.

Even more remarkable is Mr Justice Shearman’s treatment of the passage; for he asserts, with no basis whatsoever and going well beyond what the prosecution had argued, that ‘what’ refers to whether it was better to kill Percy by means of poison or a dagger.

A more careful analysis using the aids mentioned above can take us some way beyond this. First, we can quite confidently eliminate some of the possible hypotheses. For example, the judge’s suggestion can be attacked on the following grounds:

- 1 It is sheer speculation, with no evidence to support it.
- 2 It involves a *petitio principii* in that it assumes what it seeks to prove.
- 3 It does not make sense of the passage, ‘Don’t forget what we talked in the Tea Room [about whether to use poison or a dagger], I’ll still risk and try if you will – we only have $3\frac{3}{4}$ years left darlingest.’

Again, we can fairly confidently discard the first hypothesis that ‘what’ could refer to almost anything. The context of the letter as a whole, the context of the sentence, the general background of their relationship, and the testimony of both Freddy and Edith all support the proposition that ‘what’ concerned some aspect of their relationship, rather than something else. It seems unlikely that it referred to buying a motor car or that morning’s world news, for example.

Of the remaining six hypotheses (2–7), only (2) favours the prosecution thesis that they were conspiring in the tearoom to kill Percy. Number (7) (general

conversation about their situation) hardly constitutes evidence of conspiracy. The other four hypotheses all positively support the defence contention that the conversation had nothing to do with murder. Even if we totally discount testimony of both accused that it referred to eloping (the 'risks' being financial or of social stigma), the context of the letter as a whole and the words '3 $\frac{3}{4}$ years left' both tend to support the judgement that an innocent explanation is a good deal more likely than the prosecution's interpretation. At the very least, such factors seem to me to cast a reasonable doubt on that interpretation, yet this passage was the main item of evidence in support of the conspiracy theory. The passage supports the proposition that they met and talked seriously about their relationship, but it gives no significant support to the proposition that they were conspiring to kill; if anything it tends to negate it.

Undertaking such analysis and reading about it can appear wearisome to most people. It is much more entertaining to play with stories and let Edith go hang. This kind of approach, however, can and does yield results. In this particular instance I do not think it can do more than eliminate some of the possibilities and cast doubt on the wisdom of making any confident judgement about what was said in the tearoom; but in regard to other passages, including some that played a key role in the case, meticulous analysis can lead to the conclusion that one particular interpretation is very probably (or almost certainly, or even beyond peradventure) the correct one. However, in this particular case one's conclusions about different individual passages in Edith's letters tend to point in different directions. For example, the more carefully one studies the 'Marconigram' passage (appendix 2, page 385, the less easy is it to believe that Edith was merely fantasizing or playing games, or that Freddy was not actively involved in whatever was being transacted between them at that time. On the other hand, some of the other apparently damaging passages either become hopelessly ambiguous in the light of careful scrutiny or else seem to help Edith in one way or another. In short, it is unlikely that this kind of analysis will ever conclusively resolve all the doubts about Edith Thompson's guilt. In my view, however, it strongly substantiates the judgement that there is at least a reasonable doubt about it.

Conclusion

I have suggested that careful analysis of even such unpromising material as Edith Thompson's allusive, ambiguous, inconsequential love letters can at least reduce the range of plausible interpretations, even if it cannot resolve all doubts. I would further suggest that such analysis is the best available way of getting as near as possible to the truth, but it was not the method used at the trial nor is it a method that is well suited to our system of adversarial proceedings and oral presentation of evidence. In my view, the prosecution used selected passages unfairly by taking them out of context, attributing particular meanings to them on the basis of innuendo, impression, and bare assertion rather than analysis and argument. The reading aloud of the letters in court could create only a general impression, which is no substitute for careful study of the texts. Even if the defence had been handled more skilfully, and if the emotional

atmosphere and the pressure of time had been less, the basic flaw would have been the same: the oral presentation of such material, whether to twelve laypersons or to an experienced professional, cannot provide a satisfactory basis for the careful analysis and evaluation of the evidence. Thus my conclusion is that dispassionate, logical analysis of even such unpromising material as Edith Thompson's letters is a possible, indeed even a necessary, method of trying to work toward the truth, but that such a method is incompatible with oral presentation of the material – as much in a public lecture as in a courtroom.

Part 2 Edith Thompson: fresh evidence and new perspectives

WILLIAM TWINING

One hazard of academic life is to learn of an important work on one's subject shortly before or after completing a project. I was making final revisions to 'Anatomy of a *cause célèbre*' (hereafter 'Anatomy') in June 1988 when I learned of the publication of *Criminal Justice: The True Story of Edith Thompson* by René Weis. This is by far the most substantial study of the life and death of Edith. Remarkably, Weis and I are colleagues at University College London, yet over a period of five years neither of us knew that the other was working on the case. Dr Weis's is a scholarly contribution to the general literature on *causes célèbres* and is the first full-scale biography of Edith.

Criminal Justice contains much new information and many insights about Edith Thompson. I share many of Dr Weis's values and I agree with some, but not all, of his interpretations and judgements.³¹ We both conclude that Edith was probably wrongly convicted, but for somewhat different reasons. However, this section deals only indirectly with the 'truth' about Edith Thompson. Rather, its concern is methodological. It is a case-study of the differences in approach of a jurist using modified Wigmorean analysis and a specialist in English literature using a sophisticated version of the narrative method to reconstruct and present the 'True Story of Edith Thompson'. My objective here is to explore quite briefly and report as honestly as I can what I think a first reading of Dr Weis's account has added to my understanding of the case with respect to the question 'Was Edith guilty as charged?'; and, secondly, what modified Wigmorean analysis might have added to his account. This is a sort of 'thought experiment'. In order to reach for relative detachment I shall refer to both authors in the third person.³²

Criminal Justice is a substantial book of over three hundred pages. It is presented in a form designed to attract the general reader. It is based on extensive and meticulous original research and contains some conventional scholarly furniture: a table of contents, a preface, two pages of acknowledgements, a list of illustrations, a 'cast of main characters', an appendix on sources, and an index based almost exclusively on proper names. Significantly, it has almost no footnotes. Even more significantly for present purposes, it is presented as a story: the arrangement is chronological, starting with a description of Edith's parents and ending with a harrowing reconstruction of the execution of Edith and Freddy and a brief account of the

subsequent lives of Edith's closest relatives. The whole forms a readable, coherent, and moving narrative biography. Weis states, 'My readers will be the final arbiters of whether or not . . . I have successfully allowed Edith Thompson to argue her innocence.'³³

Criminal Justice differs from 'Anatomy' in respect of, for example, purpose, length, style, source material, comprehensiveness, literary form, and intended audiences. They are contrasting products of significantly different enterprises. There is, however, a solid basis for comparison, for both works focus on the question of Edith's guilt, using her letters as the main, but not the only, evidence. One can thus compare and contrast two different ways of treating selected matters bearing on this question, with particular reference to the relationships among narrative, analysis, and argument.

Standpoint

The first step in any such analysis is to clarify standpoint by asking 'Who am I? At what stage in what process am I? What am I trying to do?'³⁴ Partial answers to these questions in respect of *Criminal Justice* and 'Anatomy' have already been indicated. However, posing the questions more sharply suggests some further affinities and contrasts. Both authors purport to adopt the standpoint of an historian exploring the question of Edith's guilt from almost the same vantage point: University College London in the 1980s.³⁵ Neither is a professional historian; both are liberal academics with a humanistic bent. They have produced works for publication at the end of rather different processes of research. Personal factors apart, some of their differences in perspective might be attributable to the kinds of differences one might expect between a legal and a literary mind: Twining more drily analytical, Weis more practised in the interpretation of literary texts and character. However, one may ask: Is it sensible to think in such terms or to draw sharp distinctions between legal and literary historical truth? Are not the similarities in standpoint much greater than the differences, given that they have both been addressing essentially the same central question?

Weis's story is based on extensive original research.³⁶ He has located an impressive range of materials in newspapers, official records (some made publicly available for the first time); 'evidence' to two Royal Commissions; parliamentary debates; and, of course, the record of the trial (edited by Filson Young); and numerous secondary works, few of which, he says, add much to Young's volume. Weis can claim some notable coups: he has unearthed some new letters from Edith, Freddy, members of their families, and others. Apart from their intrinsic interest some of these are directly relevant to the question of Edith's guilt. He has also interviewed a number of people who knew some of the actors or who were able to throw light on the environment of the main characters and the central action of the story. Almost as significantly, Weis reports that some potentially crucial documents are missing (including the originals of Edith's letters) and some official files are still closed. Weis uses his material to give the fullest account to date of the background,

biographies, and personalities of the main actors, but both authors use the published version of Edith's letters as their primary source for the events leading to Percy's death.

The facts in issue: elucidating the question

Weis interprets the charge of murder against Edith almost exclusively in terms of conspiracy, as did Mr Justice Shearman in his charge to the jury.³⁷ However, he interprets the relevance of conspiracy rather differently from both Shearman and Twining. The former directed that the jury should convict only if they were satisfied beyond reasonable doubt that the lovers had planned this attack. Twining suggests that it would have been sufficient to convict Edith if the jury was satisfied that Freddy acted in pursuance of a continuing conspiracy to kill Percy whenever opportunity arose. Weis tends to gloss over this distinction. He also treats the question of whether Edith and Freddy had conspired to poison Percy in the period up to May as central to the question of Edith's guilt.³⁸ Twining, on the other hand, argues that under the broken chain theory, even if Edith were held to have attempted to poison Percy or to have conspired with Freddy to do so, these acts were too remote from the fatal attack to be sufficient to implicate her in the murder. As the prosecution tried to argue, some of the early letters could be interpreted to support the theory of a protracted and continuing conspiracy, but the defence countered that the evidence failed to support the hypothesis that, if there ever was a conspiracy, it was continuing or that Freddy had acted because of it. Twining differs from Weis in being much less confident that all the early letters are susceptible to an innocent interpretation, but believes that far less turns on them than Weis thinks.

Weis pays relatively little attention to the significance of incitement, both in respect of the murder and of interpreting some of the potentially most damning passages in the letters. Twining, on the other hand, argues that Edith was more vulnerable in respect of incitement than conspiracy, even without resort to the legally dubious but psychologically plausible 'exploding bomb' theory.³⁹ However, in his analysis the chain was also broken in respect of incitement.

It might be argued that, since the trier of fact was a jury of laypersons charged with rendering a general verdict, they would not in practice be concerned with such legal niceties. They made an undifferentiated (holistic?) judgement about Edith's legal (and moral) responsibility for Freddy's act, and this is what society expects of juries. Accordingly, this should also be adequate for an historian. On this view, Twining's differentiations are unduly legalistic and academic. Twining dissents. Such an argument is not qualitatively different from the judgement, which may well be historically correct, that Edith was 'hanged for her immorality'.⁴⁰ In so far as our enterprise is rationally reconstructing the strongest possible arguments concerning Edith's legal responsibility for Percy's death, precision is very important indeed. The crucial point is that under Twining's interpretation of the law the prosecution had several alternative routes open to them, and Edith's defenders need to deal with all of the main alternatives. Wigmorean analysis requires as precise a clarification of

the legal issues as legal interpretation will admit; and where, as in this case, there are multiple facts in issue, some of which are open to more than one interpretation, arguments have to be constructed about each of them.

Theories of the case

In 'Anatomy' Twining outlines four main theories of the case, each with several possible variants and subvariants: the conspiracy theory, the incitement theory, the fantasy theory, and the broken chain theory. A statement of a theory in this context means a summary statement of a general argument about the facts in issue. A theory in this sense is an analytic device of macroscopic analysis. For advocates, such theories typically form the basis of a strategy of argumentation; for historians and the like they are similarly a useful instrument for organizing complex material. In analysing the present case, outlining four main theories and their variants helps to clarify how each side had several different routes open for reaching the conclusion for which it was arguing. Twining suggests that the broken chain theory is the most plausible of the four. It has the special advantage that it can be used to cumulate doubt about opposing theories without necessarily claiming to advance a fully coherent account of the truth about Edith Thompson. This theory was the main basis for the defence strategy at Edith's trial, but was undermined by her insistence on testifying and therefore being compelled to advance one account of key events and one interpretation of some passages in her letters. Most secondary writers who are sympathetic to Edith, including Weis, rely heavily on the fantasy theory. This has the most human interest and fits in with the function of general literature on *causes célèbres*, which tend to be judged by their entertainment value as well as – or more than – by their contribution to knowledge. Twining, however, believes that the fantasy theory is very difficult to sustain by evidence and argument. It is both highly speculative and difficult to reconcile with some of the data. It is in his view the least cogent of the four main theories, although it is not as weak as the tearoom conspiracy theory.

Weis does not use the concept of 'theory' to differentiate lines of argument. It is reasonable to interpret *Criminal Justice* as being based primarily on a version of the fantasy theory with a few broken chain points used to supplement his case.⁴¹ As noted above, Weis does not differentiate very clearly among the competing theories and their variants. This blunts the force of his negative attack on rival hypotheses and leads him to underestimate the importance of incitement in building up the case against Edith, especially in providing alternative interpretations of some of the letters.

On the positive side, it is probably fair to say that Weis, by sustained and careful interpretation of Edith's letters, constructs the most plausible and best supported version of the fantasy theory yet published. Most secondary writers assert (rather than try to prove) the fantasy theory and, in so doing, commit or come close to committing the fallacy of *petitio principii*. Weis, through skilful use of Edith's letters to document the theme of the constant intermingling of fact and fiction,

at least provides an impressive number of texts to ground the thesis. His subtle reconstruction of Edith's character, not least through a perceptive use of her reactions and commentaries on the novels she has been reading,⁴² lends support to the fantasy theory. At the very least he provides a coherent and plausible interpretation of the letters read as a whole that is consistent with this line of argument. However, as will be argued below, his interpretations too often involve assertion rather than argument. Moreover, the fantasy theory is by its nature heavily dependent on 'soft' psychological speculation, which is in danger of foundering at crucial points when compared with rather 'harder' data.

A first reading of *Criminal Justice* suggests a further, ironic, twist. Weis's version of the fantasy theory, even if true, does not necessarily absolve Edith from legal responsibility. Even if those passages of her letters which suggest that Edith had tried to poison Percy or that she is 'dreaming' of Percy's death are indeed mere fantasy, she is still responsible for communicating those thoughts in a form which might reasonably be interpreted as being factual reports of her acts or desires – for example, that she had tried to poison Percy or that she wished him dead.⁴³ Absent a positive defence of insanity, such acts could legally ground a finding of incitement or conspiracy. There are some hard facts that need to be explained away: Edith did make these statements; she admits to having tried to manipulate Freddy on a number of occasions, as lovers do; she did send at least nine cuttings about cases of murder by poison;⁴⁴ she did ask Freddy to send her 'things' which might be interpreted as poisons;⁴⁵ Freddy did supply her with some medicines;⁴⁶ Edith more than once expressed a wish that Percy were dead;⁴⁷ Freddy did kill Percy. The fantasy theory has a lot of explaining to do; it is inevitably speculative and fantasy can spill over into fact as easily as fact can spill over into fantasy – even if such a distinction can be maintained in legal or other discourse.⁴⁸ This is not to say that the fantasy theory is untrue nor to suggest that it has no explanatory power to negative criminal intent. As an argument, however, it is not very cogent.

Sub-theories, sub-plots, and characters

In 'Anatomy' Twining argues that an assessment of the characters of the main protagonists and of their relationships to each other is relevant to each of the main theories of the case. He reports a number of different interpretations of these matters that were implicit in the arguments at trial or that have been advanced in the secondary literature, but he does not seek to develop them in detail.

Criminal Justice, on the other hand, adduces a wealth of new biographical and background facts, and builds up in fascinating detail a picture of Edith, Freddy, and Percy, as well as many other members of the cast of characters. It contains a rich, perceptive, and plausible account of all these matters which cannot but add to our understanding of the story, even if one does not accept all of the interpretations. At the macro level, Weis's most striking achievement is to piece together a coherent and detailed chronological account of the course of a number of key relationships – not

only between Edith and Freddy, but also between the lovers and members of their families and their circle of friends and contacts. Of particular interest is the detailed account of the course of the relationship between Edith and Freddy, including some significant new information about their attempts to communicate with each other after the trial.⁴⁹ Some of the detail may be irrelevant or tangential to the question of Edith's guilt, but the story is well worth telling at length for its own sake and Weis tells it very well. The final chapters have been justly praised as a devastating depiction of the horrors of capital punishment.

Not surprisingly, this meticulous reconstruction has implications for all of the main theories of the case. Although it is presented as an argument in favour of Edith's innocence, it also provides material that could be used for and against each of the main theories. To take but one example: Weis's account of the relationship between Freddy and Edith (which had even more ups and downs than had previously been noted)⁵⁰ supports the general thesis that the early letters are of very limited value in interpreting the events immediately preceding Percy's death. It strongly negates any suggestion of either continuing conspiracy or protracted incitement. It gives some support to the contention that the prejudicial effect of the early letters outweighed their probative value and that they ought not to have been admitted at all.⁵¹ On the other hand, given time, some parts of Weis's account could be used to argue that Edith was probably guilty of some of the lesser offences charged in the second indictment (which was not proceeded with) in the early phase of the relationship.⁵² However, that is beyond the scope of this essay.

Weis's reconstruction of characters, relationships, and sub-plots (including some new ones) is very helpful in interpreting and making sense of many passages in Edith's letters. One does not need to accept all of his particular interpretations to recognize the value of these intermediate generalizations and of a coherent narrative as aids to developing well-grounded, mutually supportive interpretations of the meaning and significance of these elusive texts. The process is, of course, reflexive: one constructs a picture of a character, or incident, or sequence of events from the letters or other sources and uses these constructs to interpret the letters. This is quite compatible with a Wigmorean approach and Weis is arguably at his best at this level of analysis.

Microscopic analysis

Two main values are claimed for Wigmorean analysis: at the macro level it helps clarify the central issues and impose order on a mixed mass of evidence or data through the development of carefully formulated hypotheses, theories, and subtheories; at the micro level it provides tools for sharply focused and detailed analysis of selected phases of an argument that have been identified as potentially crucial or otherwise deserving special attention. At each level the main claim is that it helps to clarify what precisely is being argued as a preliminary to evaluating its cogency. In 'Anatomy' some particular examples were chosen to illustrate the application of microscopic analysis. We have already looked at the treatment of just one of these in

Criminal Justice, the last letter (exhibit 60) with particular reference to the ‘tearoom passage’.⁵³

Twining concludes that the passage does not give any significant support to the conspiracy theory; if anything, it tends to negate it. Furthermore, the analysis suggests that the prosecution, the defence, and the judge all used the passage in ways that do not stand up to close scrutiny.

Weis reaches a similar conclusion by a different route.⁵⁴ He reconstructs the context of the letter and the events to which the key passage refers. He argues plausibly, partly on the basis of new evidence, that the letter was written before 5 p.m. on Monday, 3 October (i.e. a few hours before the killing), and that the meeting in the tearoom took place on Friday, 29 September, and not on 3 October, as the prosecution had suggested.⁵⁵ He states: ‘The Crown will mistakenly assume that the tea room conversation occurred on Monday afternoon, the day before the murder and that it ought to be *causally* linked to the tragedy.’⁵⁶ This is a partial *non sequitur*. If it were accepted that Edith and Freddy had been conspiring to kill Percy a few days before his death, that would have been sufficient to implicate Edith. It is only marginally more damaging to claim that the meeting took place a few hours before the murder, rather than a few days. The dating of the letter and of the meeting involves only a minor and immaterial adjustment in the prosecution’s version of the events. In this instance textual analysis is more helpful than contextual analysis, because the point at issue is what the passage means.⁵⁷

The other specific points analysed by Twining can be dealt with briefly. Weis’s account of Freddy’s movements in the twelve hours before the murder is much more detailed but, like Twining’s, casts doubt on the proposition that the attack was premeditated.⁵⁸ Weis produces some new information about the knife:

Getting a knife under the circumstances was hardly *prima facie* evidence to be used to convict, although his carrying it on this night was a different matter. The dagger itself consisted of a double-edged blade, which measured five and a half inches and protruded from a four-inch long, chequered pattern handle. The weapon caused a stir when it was produced in court, not least among the jury. The police might never have found it, had Bywaters not told them precisely where to look, unaware of the damage its visual impact would inflict on his case.⁵⁹

Weis’s account of Freddy’s movements also supports the proposition that the knife fitted easily and inconspicuously in Freddy’s coat pocket: Freddy left home about noon (a crucial moment in the premeditation thesis), met Edith twice, completed a few errands in the city,⁶⁰ dined with the Graydons, went out for a drink at a nearby hotel with Avis Graydon (Edith’s sister), and made several journeys by public transport.⁶¹ There is no evidence to suggest that anyone noticed he was carrying a knife. All this in turn is at least consistent with Freddy’s claim that he always carried it with him.⁶² Weis invokes the defence’s generalizations about merchant seamen carrying knives in foreign parts, but implicitly acknowledges that this does not in itself dispose of the proposition that possessing and carrying such a knife in

London is in itself suspicious. It was a quite formidable instrument. Weis confirms that there is no evidence to support the suggestion that Freddy had purchased the knife recently for the specific purpose of threatening or attacking Percy.⁶³ All in all, this corroborates Twining's contention that the evidence about the knife gives little support to the premeditation thesis; however, its nature and size (Weis follows Shearman in calling it a 'dagger') is damaging to Edith as well as to Freddy in the context of the premeditation argument because that bears on the conspiracy and broken chain theories.

Perhaps because he underestimates the significance of incitement, Weis never squarely addresses the crucial but complex question 'Was Edith the dominant partner in respect of significant phases of the story?' If she was, it is suggested, this could ground a different interpretation of some key passages in her letters from those advanced by Weis. To put the matter crudely: If one sees Edith as a manipulative, scheming, or forceful woman who exerted or tried to exert influence over her younger, less experienced lover, this supports the thesis that several passages constitute incitement or solicitation to murder either by direct exhortation or by more or less subtle innuendo. This could significantly change the texture and emphasis of Weis's story, although Edith might still be rescued from responsibility for murder by the broken chain argument. Before applying this to a specific example, it is necessary to consider Weis's method of interpreting the letters.

Interpreting the letters

René Weis's enterprise is to reconstruct and present 'the true story of Edith Thompson'. He is openly sympathetic to Edith and explicitly claims to argue her case in her own terms.⁶⁴ *Criminal Justice* is, in an important sense, Edith's story and is presented in a form which serves literary, humanistic, and publishing values as well as the pursuit of a mundane kind of truth. It is a good read. In considering Weis's method it is accordingly important to distinguish between analysis and presentation and between narrative and argument. This is especially significant in the present context in that the main values claimed for the Wigmorean approach relate to analysis rather than presentation (e.g. it is more useful in pretrial preparation than in presentation at trial). Furthermore, although narrative may legitimately form part of a rational argument – stories may constitute arguments as well as be vehicles for presentation – narrative may also be used to sneak in irrelevant or invalid factors, to gloss over weaknesses in an argument, to obscure what is being argued, or to serve other functions such as attracting attention, sustaining interest, or winning sympathy.⁶⁵ It might be the case that while Weis's treatment of the case is more readable and eloquent, Twining's argument is more cogent.

In *Criminal Justice* Weis uses the letters as the main vehicle for presenting a coherent account of the story of Edith. Only exceptionally does he explicitly discuss alternative interpretations of these texts. If he had done so, it would have broken the flow in ways which not only would have reduced readability, but also would have impaired the coherence of his presentation. This is not to suggest that as a

meticulous and fair-minded scholar he did not analyse and consider some competing interpretations and the arguments for and against them. It is fair to say, however, that in dealing with the letters he generally reports his conclusions and only occasionally considers competing interpretations in detail. This opens up a whole range of issues that will not be pursued here. Rather, let us illustrate some quite simple points with reference to a single passage.

Appended to a long letter, dated 1 April 1922,⁶⁶ but possibly written over several days, is a separate note which begins: ‘Don’t keep this piece.’ The text of the note is reprinted in full in appendix 2, page 385. It is worth reading carefully at this point. It has been widely regarded as the most damaging part of all Edith’s correspondence by the lawyers in the case, by commentators, and by many intelligent law students, most of whom were sympathetic to Edith.

After summarizing the passage rather less scrupulously than usual, Weis comments as follows:

That this piece of fantasy could ever be construed as part of a premeditated murder plot defies belief. Bywaters knew it was fiction and that she had herself tasted the quinine in the tea to be able to give an accurate account of Percy’s complaint.⁶⁷ In the court the jury was told that ‘the passage is full of crime.’ Yes, as long as it is understood that ‘crime’ means ‘imaginary crime.’ It is never easy to separate fact from fiction in Edith Thompson’s extensive and intense correspondence, and though outside evidence is available to help distinguish one from the other, the more intimately acquainted the reader becomes with the correspondence, the more complex its rash interweaving of fact and fiction is bound to appear. In most of our lives such a blurring is not uncommon. It is not always harmless. But it is seldom the matter of life and death into which it is developed here.⁶⁸

This contrasts sharply with Twining’s report of his reactions to the passage. He states, ‘the more carefully one studies the “Marconigram” passage, the less easy is it to believe that Edith Thompson was merely fantasizing or playing games or that Freddy was not actively involved in what was being transacted at the time.’⁶⁹ This merely reports a considered judgement reached after quite lengthy discussion in several classes. Rather than attempt an elaborate analysis of the whole passage, which *prima facie* contains several damaging statements, let us focus on one sentence and outline a strategy for construing it: ‘I wish we had not got electric light . . . [I]t would be so easy.’ To what might ‘it’ refer in this context? Nearly everyone who reads this for the first time concludes, in the context of the rest of the note, that ‘it’ means killing Percy (using gas; interpretation 1). A strong case for this can be built up solely from the internal evidence of the passage. Other possibilities include making Percy ill, but not killing him (interpretation 2),⁷⁰ but the talk of death in the previous sentence casts doubt on that. Some commentators have suggested that this – and some other passages – refer to Edith’s trying to perform an abortion on herself (interpretation 3). Even if these other passages support the sub-theory that Edith was pregnant by Freddy (as Weis argues) or even that she experimented with unconventional methods of contraception, these interpretations do not make sense

in this context. For example, how can one reconcile them with the timing of these actions ('I'm not going to try any more until you come back', 'I'm going to try the glass again occasionally')? And what of 'if we are successful in our action' (what action?) or the need to be careful in what Freddy says to Dan, and so on?

If 'it' does refer to killing Percy, can this meaning be explained away? One possibility is that Edith was pretending to try to kill Percy.⁷¹ If so, why would she do this except to urge Freddy to try, too? Or could this all be a joke – a form of black humour, even an April Fool – or a more elaborate game of make-believe? The last is the most common version of the fantasy theory; its application seems dubious in this context. First, it seems likely from the context that Dan existed, that the 'Sunday morning escapade' actually did occur,⁷² and that Freddy did supply quinine and other drugs to Edith. It stretches one's credulity to suggest that the harmless elements are true but the damaging ones are fantasy. Secondly, whose fantasy is it? If only Edith's, how do we explain the passages that imply Freddy's participation ('About the Marconigram? – do you mean . . . what you said about Dan?'). If this is a joint fantasy, how does this square with our general picture of Freddy as the down-to-earth young fellow who dismisses Edith's 'vapourings' as 'melodrama'? The reader is invited to construct an argument that explains away this note as evidence which supports any of the following propositions: (a) that at that time, Edith and Freddy were in fact conspiring to kill Percy; (b) that Edith was pretending that she had been trying to kill Percy in order to incite Freddy to risk and try, too; or (c) that Edith, on this and other occasions, was telling Freddy that she wished Percy's death.

I return now to Weis's method. In this instance, he asserts rather than argues that the whole note is a 'piece of fantasy' and that Freddy knew that.⁷³ This is tantamount to a *petitio principii*. Furthermore, it is not clear what precisely he is arguing when he says that '[i]n most of our lives such a blurring [of fact and fiction] is not uncommon . . . But it is seldom the matter of life and death into which it is developed here.' Blurring of fact and fiction about the death of one's husband is not so very common, and the coincidence of harmless fantasizing about such a death with the actual murder of the object of such fantasies is unique in my experience. On reconsideration, in my judgement the Marconigram note does lend support to several elements in the incitement and conspiracy theories; it also raises some doubts about the fantasy theory itself, for the reasons stated. However, the timing of the note (six months before the attack) still leaves ample scope for the broken chain theory.

Many of Weis's interpretations of Edith's letters help to make sense of them and are much more convincing. However, he generally advances an interpretation on the basis of assertion or implicit argument without considering alternatives.⁷⁴ To have done otherwise with the great majority of letters would probably have been unrewarding as well as tedious. However, closer textual analysis of competing interpretations of selected key passages would almost certainly have refined his argument, and might even have changed it.

Fresh evidence and new perspectives

Weis has collected a mass of new data and revealing insights and has skillfully woven them into a coherent whole which, for most readers, is greater than its parts. Much of the new material fleshes out the background; some has a direct bearing on the central issue. Most of the new information helps build a quite sympathetic picture of Edith; some of it could be used against her. Some of the facts are 'hard' – such as the dimensions of the knife; other data are more difficult to evaluate. What, for example, is a historian to make of the following judgement of Margery Fry, who visited Edith in prison and afterward became a committed abolitionist? According to Fry's biographer, Edith struck her 'as a rather foolish girl who had romanticised her sordid little love affair and genuinely thought herself innocent, discounting her own influence on her lover.'⁷⁵ For an historian, is this evidence that bears on the question of Edith's guilt?

The central themes of this book – the interplay of law, fact, and value, of reason and imagination, of narrative coherence and atomistic analysis – have all resurfaced in this essay. What, if anything, does it suggest about the uses and limitations of Wigmorean analysis? My personal conclusion is as follows: *Criminal Justice* has added immeasurably to my knowledge and understanding of a case with which I already had an intimate acquaintance. It is an outstanding example of what Wigmore called the 'narrative method'. The book's argument in respect of the issue of Edith Thompson's guilt would almost certainly have been sharpened and refined by the application of modified Wigmorean analysis – first, in respect of clarification of the precise issues of law and fact, differentiating several distinct theories of the case, and the broad lines of argument that bear on them; and, secondly, in respect of selecting and subjecting to detailed microscopic analysis key phases of these arguments. Wigmorean analysis would have supplied a firmer foundation and clearer lines of argument around which to build Weis's detailed edifice. Finally, René Weis has reconstructed a version of events which contains the most careful, cogent, and coherent case for Edith's complete innocence that has yet been made. His narrative also contains a good deal of material that could be used for several other lines of argument. For me, the effect of reading, reflecting upon, and reacting to Weis's account has been to strengthen my belief that although some of Edith's letters could reasonably be construed as involving acts of incitement, Weis's account strengthens the case for the broken chain theory.

Part 3 The biographer's response to a Wigmorean analysis of *R v Bywaters and Thompson*

RENÉ WEIS

Narrative biography and methodology

Although William Twining and René Weis agree about Edith Thompson's innocence to the extent that both writers believe her to have been wrongfully convicted,

Twining's analysis of much of the same evidence at first seems to differ strikingly from Weis's, even though both writers take their cue from the same material, Edith Thompson's correspondence.

It will be the purpose of the ensuing pages to offer some reflections on these two approaches, particularly on the methodology of a narrative account of the case and how it bears on details of the evidence. The strategies of a narrative history are bound to differ from those deployed in an analysis such as Twining's, which is embedded in a structured approach whose intermediate conclusions are set out at every turn.

Different audiences respond differently to various expositions of the same material, and it will be argued here that the audience the writer has in mind may determine the differences in methodology. Weis's study was conceived as a biographical work from the cradle to the grave. It aimed to evolve chronologically from Edith Thompson's birth and childhood in the 1890s to her death at Holloway in 1923. Although this seems in many ways the obvious course to follow, it was in fact a decision by the author which conflicted with the wishes of the publishers, who preferred a stronger opening in the death cell at Holloway. Such a narrative strategy would have been legitimate in view of the obiter dicta about what it is, above all, that renders Edith Thompson's life a legitimate, albeit painful, subject of study. The long-term effect of a 'dramatic' opening, however, would have been the opposite of the one intended by Weis, which was to take the reader into the recesses of Edith Thompson's inner and outer life without at first framing her entire existence by the end in the manner of a Sophoclean tragedy. It seemed preferable to chart the mundane details of the life of a reasonably affluent London housewife who was also an urban professional, and to pretend that nothing sinister lay in store for her, rather than to distort our perspective on the case by setting the whole life in the context of violent death.

The 'plot' of the narrative of *Criminal Justice* consisted in minutely detailing the course of Edith Thompson's life in order to enlist the reader's empathy, to get the reader to identify with or at least understand (while not necessarily condoning) Edith Thompson's every move. Weis was greatly assisted in the task of charting Edith's movements by Edith Thompson's own practice in her letters of recreating her days in a kind of subdocumentary writing, as a way of tying Bywaters to her (or attempting to do so). In Twining's earlier analysis of Edith's letters, he quotes a law student as saying that 'If you can analyse Edith Thompson's prose you can analyse anything' to describe the problems posed by what Twining perceives to be the 'stream-of-consciousness quality' of her letters. Coming to these letters from a slightly different tradition, Weis does not quite take this view, although it is certainly the case that the letters often ramble, freely associate, and at times seem to be the product of an undisciplined imagination. On the other hand, the same prose which can be described as 'deathly' by Twining often sounds colourful notes that more refined and self-conscious writers in the period do not always achieve in spite of striving to do so.

The main object of the first part of *Criminal Justice* was therefore to make Edith Thompson's life happen as a life, and it is this which decided Weis to write the bulk of the book in the present tense. There were a number of reasons for this, but the clinching one was the extent to which the narrative use of the past tense forecloses reality, whereas the use of the present, in theory at least, leaves everything open: the future is never less anticipated than in a present tense narrative, whereas in a past-tense story the future has already happened at the time of its telling. To that extent the biographical narrative proposes a 'fiction' of the case which, in its own terms, agrees with Twining's strategic emphasis on the need to assess the evidence in the case independently from its interpretations in court.

It is of course true that the story of Edith Thompson had emphatically happened by the time *Criminal Justice* was written in the 1980s (and to that extent, the use of the present tense might be seen to be a sleight of hand), but it would not have happened for an audience of the book. The intention behind the book was twofold: (a) to clear Edith Thompson's name through putting her case to the jury of a contemporary British audience; and (b) to convince the Home Secretary of the day that a posthumous pardon would be appropriate. The use of tense could therefore be interpreted as a legitimate forensic strategy.

Weis's training as a textual scholar provided some of the pasting up and collating expertise required for documenting Edith Thompson's life from sources. This involved the sorting of Edith's published (and some of her unpublished) correspondence into a correct chronological order, reading the novels she read, and finally collating all this with further information gleaned from several newspapers (including her own preferred *Daily Sketch*) to form a comprehensive diary. Eventually Weis was in a position to tell, almost to the hour, what Edith was doing at particular times on any given day. This allowed Weis to decode much of Edith's rhetoric (particularly as it relates to her sexuality) and to formulate the kind of contextual hypotheses which he deemed to be crucial for refuting a number of charges relating to incitement that counted heavily against Edith at her trial.

The letters

If the case in law against Edith Thompson was based on the evidence provided by the letters, then it should have stood to reason that all the letters ought to have been submitted, that counsel for the defence ought to have either (a) insisted on their inclusion from the start, or (b) demanded that the trial judge set the record straight on the Solicitor-General's prevarication when he falsely claimed that crucial evidence about the time and place of the actual murder was to be found in the letters.

The jury, who had access to only half the evidence appealed to, could not know that this was not the case. If anything, they may well have been suspicious of the contents of the withheld letters, since it was the defence who elected not to submit them. Whatever finer legal points were involved in the end, the jury's opinion was greatly influenced by the correspondence; and thirty years after the events the

foreman of the jury described their contents as 'nauseous' and noted that 'Mrs Thompson's letters were her own condemnation.'

It was Weis's firm belief that the microcosmic account of Edith Thompson's life would assist in the search for the 'truth' about the death of Percy Thompson, and that Edith Thompson's innocence could be proven best through the telling of the story of her life and milieu and through a scrutiny of her fantasies – particularly where those can be measured against texts which inspired them, in this case romantic novels from the period.

The fantasy theory

Twining notes that Weis's study is largely predicated on the fantasy theory. This is a fair assessment. It need not, however, open the study to the charge of evolving in an area where the writer could therefore be thought to be selecting at random what he likes (if it assists Edith's case) and discarding what he dislikes (material prejudicial to Edith's innocence). It is of course the case that Weis never appears to entertain the idea of Edith Thompson's guilt, and that this certainly results in a number of shortcuts through some of the evidence that is open to hostile interpretation. Weis's defence against this would be to maintain that the burden of proof did (and does) rest with the prosecution, and that the Crown never produced the conclusive evidence that would have convicted Edith Thompson in a fairer trial.

Twining also stresses the widely held view (by Marshall Hall, among others) that if Edith had not taken the stand she almost certainly would not have been convicted of the charges brought against her, notwithstanding strong suspicions on the other counts which were not pursued. In view of this it does not seem entirely illogical of Weis 'to suggest that the harmless elements [in Edith's letters] are true but the damaging ones are fantasy'.⁷⁶ If Edith Thompson was innocent, then that would logically be the case. The potentially damaging passages could be innocently explained, and the innocent ones would be either true or untrue, but it would not greatly matter.

Furthermore, Weis believes that the narrative method can contextually prove that 'the most damaging part of all Edith's correspondence', the Marconigram,⁷⁷ is open to an innocent reading as long as the principle of the presumption of innocence is respected.

The tearoom and the Marconigram

Before proceeding to the Marconigram,⁷⁸ it is worth turning to the tearoom passage (exhibit 60; see appendix 3), which Weis analyses at some length,⁷⁹ as does Twining.

The two different approaches here coincide in their conclusion, but arrive there from very different directions. Weis was concerned to establish that the (potentially) most incriminating sentence in the letter, 'Don't forget what we talked in the Tea Room, I'll still risk and try if you will', referred to a conversation five days before the murder. The Crown suggested that it took place a mere twenty-four hours before the

murder with a view, presumably, to linking the sentence temporarily, and therefore, in the minds of the jury, causally, to the murder of 3 October.

Twining rightly queries the usefulness of Weis's attempt to restore the time span to its true chronology because the two lengths of time are not ultimately different enough to matter. Instead Twining demolishes, by a closely argued textual rather than contextual analysis, the probative value to the prosecution of Edith's statement. The judge did not, however, have such scruples and bluntly told the jury that the 'what' in the sentence referred to whether it was better to kill Percy by means of poison or a dagger.⁸⁰ Here again it seems that the judge's anxieties and Weis's almost coincide, albeit from opposite ends of the spectrum.

It is a measure of the difference between the approaches of Weis and Twining that Edith's question about the Marconigram⁸¹ starting with 'Don't keep this piece', should be found so damaging by some (the Crown, the judge, Twining, and – Twining reports – students in law classes), but dismissed as fantasy by Weis.⁸²

Twining's particular objection to Weis's treatment of the passage is Weis's refusal to entertain the idea that this passage ought to be treated differently from any other of the various passages in Edith's correspondence that recklessly touch on the idea of murder. Weis fully accepts Twining's stricture that a blurring of fact and fiction, when it relates specifically to the death of a spouse, 'is not so very common, and the coincidence of harmless fantasizing about such a death with the actual murder of the recipient of such fantasies is unique in my experience'. The fact that it is unique in our experience (though probably not in life) does not by itself invalidate Weis's point, but it stresses the challenge that the defence faced in court.

The reason Weis passed over this passage was not so much because of 'soft'-fact speculation, but because the hardest of all facts unambiguously seemed to him to argue against taking the passage as conclusive evidence of an attempt on Percy Thompson's life by Edith. The 'hardest' fact here refers to Sir Bernard Spilsbury's autopsy report (independently corroborated by a second Home Office pathologist) that there were no traces of poison or glass in Percy's body. To argue, as the Crown did, that the passage is 'full of crime', flies in the face of the pathologists' reports (there was no poison, no glass, and no attempt even to use gas, which is mentioned here as a possibility).

Within days of sending the Marconigram letter, Edith wrote again and, presumably to protest her good faith, announced that she had now 'used the light bulb three times but the third time he found a piece – so I've given it up – until you come'. The 'light bulb' in question was the 'electric light globe' that she referred to in the last sentence of the Marconigram letter.

It seems to Weis that although one may well be legitimately troubled by the business of 'Dan', wonder about the 'Sunday morning escapade', and be dismayed by Edith's dallying with fanciful ideas of murder, these are presumably fanciful in law, unless the concept of incitement makes no allowance for a period of 'penitence' in the five-month gap between the letter and the murder; and incitement would

legally (presumably) be the only way the Marconigram would come into play, since the methods of killing discussed here were scientifically proven not to have been carried into effect. It seems to Weis, as narrative biographer, that the Marconigram is an instance where hard facts bear out soft facts such as psychologically speculative interpretations.

That Edith Thompson was economical with the truth is undeniable. That she was capable of embellishing her untruths with shrewd authenticating touches is also true, and Weis at least suspects that Percy's rather colourful claim in the Marconigram to be 'like a cat with nine lives' may well be attributed to him by his wife.

From time to time in this essay Weis's and the judge's responses to the case have been seen to share common ground. Although this is a state of affairs that originally rather discomfited Weis, Twining's pointing this out helped to shape the approach of the preceding pages.

The judge in the case has received a poor press, not least for his notorious anti-feminism, which suggests that Edith suffered twice at the hands of male ideas about gender, due to the judge's misogyny and the Home Secretary's alleged feminism. More to the point perhaps may be the fact that the judge's intellectual and legal limitations led him to simplify the facts for the lay jury too crudely, although a careful perusal of his summing up does not quite bear this out. However, it is almost certainly the case that his blunt pronouncements on sordid affairs and marriage, along with his clear moral disapproval, carried more weight than his ultra-fair legal point about the time and place of the murder as explained above.

The jury, Weis would submit, listened to the facts, their interpretations, and the law. A combination of all three could be expected to sway them, but it would appear that in the end it was the immorality of the letters which above all convicted Edith Thompson. The defence's repeated attempts to refocus the case away from damaging moral considerations failed. It probably had as much chance of succeeding as judges' directions have when they instruct juries to 'un-hear' a piece of counsel's strategically planted indiscretion. Once the damage is done it cannot be undone. It was Weis's conviction that if the truth about Edith Thompson were to be told within the boundaries of the possible, it would inevitably become invasive and intrusive and would have to move far beyond the legal hard evidence that was used at her trial. A deeper knowledge of the law would have been helpful. It would have resulted in a better, and a more dispassionate book.

Conclusion

WILLIAM TWINING AND RENÉ WEIS

In this chapter Twining and Weis address the same question of Edith Thompson's innocence and wrongful conviction. Their approaches differ widely. Twining rigorously and exclusively focuses his analysis on the evidence provided by the trial record, while Weis, using the same material, contextualizes it in the interest of a biographical history.

The logical criteria by which evidence is evaluated ought to be the same in both cases. The fact that through a study of the same evidence Twining and Weis arrived independently at the same conclusion on the question of guilt, and by such different routes, would appear to bear this out. That is, it could be claimed that the Wigmorean jurist and the literary biographer demonstrate that Edith Thompson was wrongly convicted, just as two independent experts, be they pathologists or statisticians, might. Although Twining and Weis differ in some of their microscopic analyses, as for example in the readings of the Marconigram, the overall picture is one of broadly-based agreement. They draw the same conclusions from a substantial body of disparate raw material.

Even at the level of strategy where the gulf between the two authors seems to be widest, they share some common ground of history and narrative. Whereas Weis avails himself of a number of rhetorical devices that are commonly associated with story-telling, such as the manipulation of tense, Twining also tells a 'story', as indeed did the Crown and the defence at the original trial. The filleting of the available material by both parties at the trial, with a view to constructing coherent cases, is echoed by Twining's focus on selected key issues, such as the knife, the Marconigram, and the meaning of the word 'what'. The jurist's story is differently conceived, but its moral is the same as the Shakespearean's.

Appendix 1

Indictments

[Indictment No. 1.*]

The King

AGAINST

**FREDERICK EDWD. FRANCIS
BYWATERS**

AND

EDITH JESSIE THOMPSON.

CENTRAL CRIMINAL COURT.

Presentment of the Grand Jury.

F. E. F. BYWATERS and E. J. THOMPSON are charged with the following offence:—

STATEMENT OF OFFENCE.

MURDER.

Particulars of Offence.

F. E. F. BYWATERS and E. J. THOMPSON on the 4th day of October, 1922, in the County of Essex, and within the jurisdiction of the Central Criminal Court murdered Percy Thompson.

[Indictment No. 2.†]

The King

AGAINST

**FREDERICK EDWD. FRANCIS
BYWATERS**

AND

EDITH JESSIE THOMPSON.

CENTRAL CRIMINAL COURT.

Presentment of the Grand Jury.

F. E. F. BYWATERS and E. J. THOMPSON are charged with the following offences:—

FIRST COUNT:

STATEMENT OF OFFENCE.

Conspiracy to Murder contrary to sec. 4 of the Offences against the Person Act, 1861.

Particulars of Offence.

F. E. F. BYWATERS and E. J. THOMPSON on the 20th day of August, 1921, and on divers days between that date and the 2nd day of October, 1922, in the County of Essex, and within the jurisdiction of the Central Criminal Court, conspired together to murder Percy Thompson.

* This is the Indictment upon which there was Conviction.

† The accused were not tried on this.

SECOND COUNT:

STATEMENT OF OFFENCE.

Soliciting to Murder contrary to sec. 4 of the Offences against the Person Act, 1861.

Particulars of Offence.

E. J. THOMPSON on the 10th day of February, 1922, and on divers days between that day and the 1st day of October, 1922, in the County of Essex, and within the jurisdiction of the Central Criminal Court, did solicit and endeavour to persuade and did propose to F. E. F. Bywaters to murder Percy Thompson.

THIRD COUNT:

STATEMENT OF OFFENCE.

Inciting to commit a misdemeanour.

Particulars of Offence.

E. J. THOMPSON on the 10th day of February, 1922, and on divers days between that day and the 1st day of October, 1922, in the County of Essex, and within the jurisdiction of the Central Criminal Court, did unlawfully solicit and incite F. E. F. Bywaters unlawfully to conspire with her, the said E. J. Thompson, to murder Percy Thompson.

FOURTH COUNT:

STATEMENT OF OFFENCE.

Administering poison with intent to murder contrary to sec. 11 of the Offences against the Person Act, 1861.

Particulars of Offence.

E. J. THOMPSON on the 26th day of March, 1922, in the County of Essex, and within the jurisdiction of the Central Criminal Court, did administer to and cause to be taken by Percy Thompson certain poison or other destructive thing unknown with intent to murder the said Percy Thompson.

FIFTH COUNT:

STATEMENT OF OFFENCE.

Administering a destructive thing with intent to murder contrary to sec. 11 of the Offences against the Person Act, 1861.

Particulars of Offence.

E. J. THOMPSON on the 24th day of April, 1922, in the County of Essex, and within the jurisdiction of the Central Criminal Court, did administer to and cause to be taken by Percy Thompson a certain destructive thing, namely, broken glass, with intent to murder the said Percy Thompson.

Appendix 2

Exhibit 17: Enclosure in letter dated 1/4/22⁸³

Dont keep this piece.

About the Marconigram – do you mean one saying Yes or No, because I shant send it darlint I’m not going to try any more until you come back.

I made up my mind about this last Thursday.

He was telling his Mother etc. the circumstances of my ‘Sunday morning escapade’ and he puts great stress on the fact of the tea tasting bitter ‘as if something had been put in it’ he says. Now I think whatever else I try it in again will still taste bitter – he will recognise it and be more suspicious still and if the quantity is still not successful – it will injure any chance I may have of trying when you come home.

Do you understand? I thought a lot about what you said of Dan.

Darlint, don’t trust him – I don’t mean don’t *tell* him anything because I know you never would – What I mean is don’t let him be suspicious of you regarding that – because if we were successful in the action – darlint circumstances may afterwards make us want many friends – or helpers and we must have no enemies – or even people that know a little too much. Remember the saying, ‘A little knowledge is a dangerous thing.’

Darlint we’ll have no one to help us in the world *now* and we musnt make enemies unnecessarily.

He says – to his people – he fought and fought with himself to keep conscious – ‘I’ll never die, except naturally – I’m like a cat with nine lives’ he said and detailed to them an occasion when he was young and nearly suffocated by gas fumes.

I wish we had not got electric light – it would be easy.

I’m going to try the glass again occasionally – when it is safe Ive got an electric light globe this time.

Appendix 3

Exhibit 60: Plain envelope⁸⁴

Darlingest lover of mine, thank you, thank you, oh thank you a thousand times for Friday – it was lovely – its always lovely to go out with you.

And then Saturday – yes I did feel happy – I didn't think a teeny bit about anything in this world, except being with you – and all Saturday evening I was thinking about you – I was just with you in a big arm chair in front of a great big fire feeling all the time how much I had won – cos I have darlint, won such a lot – it feels such a great big thing to me sometimes – that I can't breathe.

When you are away and I see girls with men walking along together – perhaps they are acknowledged sweethearts – they look so ordinary then I feel proud – so proud to think and feel that you are my lover and even tho' not acknowledged I can still hold you just with a tiny 'hope'.

Darlint, we've said we'll always be Pals haven't we, shall we say we'll always be lovers – even tho' secret ones, or is it (this great big love) a thing we can't control – dare we say that – I think I will dare. Yes I will 'I'll always love you' – if you are dead – if you have left me even if you don't still love me, I always shall you.

Your love to me is new, it is something different, it is my life and if things should go badly with us, I shall always have this past year to look back upon and feel that 'Then I lived' I never did before and I never shall again.

Darlingest lover, what happened last night? I don't know myself I only know how I felt – no not really how I felt but how I could feel – if time and circumstances were different.

It seems like a great welling up of love – of feeling – of inertia, just as if I am wax in your hands – to do with as you will and I feel that if you do as you wish I shall be happy, its physical purely and I can't really describe it – but you will understand darlint wont you? You said you knew it would be like this one day – if it hadn't would you have been disappointed. Darlingest when you are rough, I go dead – try not to be please.

The book is lovely – it's going to be sad darlint tho', why can't life go on happy always? I like Clarie – she is so natural so unworldly.

Why aren't you an artist and I as she is – I feel when I am reading frightfully jealous of her – its a picture darlint, just how I did once picture that little flat in Chelsea – why can't he go on loving her always – why are men different – I am right when I say that love to a man is a thing apart from his life – but to a woman it is her whole existence.

I tried so hard to find a way out of tonight darlingest but he was suspicious and still is – I suppose we must make a study of this deceit for some time longer. I hate it. I hate every lie I have to tell to see you – because lies seem such small mean things to attain such an object as ours. We ought to be able to use great big things for a

great big love like ours. I'd love to be able to say 'I'm going to see my lover tonight.' If I did he would prevent me – there would be scenes and he would come to 168 and interfere and I couldn't bear that – I could be beaten all over at home and still be defiant – but at 168 it's different. It's my living – you wouldn't let me live on him would you and I shouldn't want to – darlint its funds that are our stumbling block – until we have those we can do nothing. Darlingest find me a job abroad. I'll go tomorrow and not say I was going to a soul and not have one little regret. I said I wouldn't think that I'd try to forget – circumstances – Pal, help me to forget again – I have succeeded up to now – but its thinking of tonight and tomorrow when I can't see you and feel you holding me.

Darlint – do something tomorrow night will you? something to make you forget. I'll be hurt I know, but I want you to hurt me – I do really – the bargain now, seems so one sided – so unfair but how can I alter it?

About the watch – I didn't think you thought more of that – how can I explain what I did feel? I felt that we had parted – you weren't going to see me – I had given you something to remind you of me and I had purposely retained it. If I said 'come for it' you would – but only the once and it would be as a pal, because you would want me so badly at times – that the watch would help you not to feel so badly and if you hadn't got it – the feeling would be so great – It would conquer you against your will.

Darlint do I flatter myself when I think you think more of the watch than of anything else. That wasn't a present – that was something you asked me to give you – when we decided to be *pals* a sort of sealing of the compact. I couldn't afford it then, but immediately I could I did. Do you remember when and where we were when you asked me for it? If you do tell me, if you don't, forget I asked.

How I thought you would feel about the watch, I would feel about something I have.

It isn't mine, but it belongs to us and unless we were differently situated than we are now, I would follow you everywhere – until you gave it to me back.

He's still well – he's going to gaze all day long at you in your temporary home – after Wednesday.

Don't forget what we talked in the Tea Room, I'll still risk and try if you will – we only have $3\frac{3}{4}$ years left darlingest.

Try & help

PEIDI.

Appendix 4

R v Bywaters and Thompson: strategic arguments

A. Key-list: ultimate and penultimate probanda

1. Edith Thompson murdered Percy Thompson (E m P)
2. Frederick Bywaters murdered Percy Thompson (F m P)
- [2a. P is dead; 2b. F stabbed P; 2c. F intended to stab P; 2d. P died as the result of the stab wounds; 2e. F acted without lawful justification or excuse]*
3. E aided and abetted F to m P
4. F m P because E incited him to m P
5. E incited F to m P
6. E incited F with criminal intent
7. F attacked P because of E's incitement
- 8a. F's attack was premeditated
- 8b. F's attack was spontaneous
9. F m P in pursuance of a conspiracy with E to m P
10. E and F conspired to m P
11. E and F planned this attack
12. E and F planned to m P whenever opportunity arose (disallowed by Shearman J)
13. E conspired with F with criminal intent
14. The conspiracy was continuing at the time of P's death.
15. E and F planned this attack in the tearoom.
16. E lacked criminal intent.

B. Theories of the case

Against Edith (Prosecution):

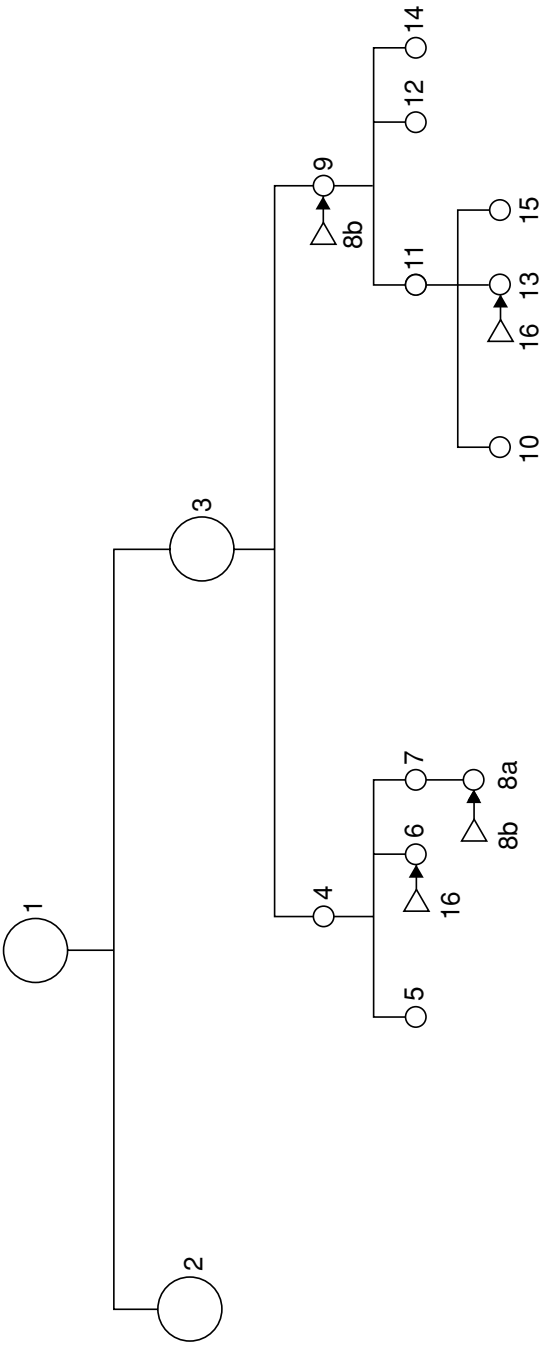
- (a) Incitement theory: F m P because, over a protracted period E incited F with malice aforethought to m P and F m P acting on E's incitement.
 - (b) Conspiracy theory: F m P in pursuance of a continuing criminal conspiracy between E and F to m P either (i) on this occasion; or (ii) whenever opportunity arose.
- Either (a) or (b) (i) or (ii) is sufficient to constitute murder by E.

For Edith (defence)

- (c) Fantasy theory. E lived in a dream world and at no stage seriously intended P's death. There was no conspiracy or incitement in that she lacked criminal intent. This mainly serves to attack propositions 6 and 13, but can also be used to give an innocent interpretation to all/nearly all the damaging passages in the letters.
- (d) The broken chain theory. Whether or not E committed acts of incitement or had engaged in a conspiracy to kill P, F acted independently. There are several possible breaks in the chain connecting E's letters and F's act (murder). This mainly challenges 7, 8a, and 9.

The two main 'jugulars' i.e. propositions sufficient to exonerate E: 8b and 16.

* Not here contested in relation to Edith and not charted.



Appendix 5

Reconstruction of arguments about the knife

Prosecution	Defence
1. The attack was premeditated.	14. When B arrived at Belgrave Road, he had no intention of killing P.T. (110, 142).
2. The murder weapon was a knife owned by B (not disputed).	
3. B put the knife in his pocket in order to kill P.T. (137).	15. B's carrying of the knife was innocent (142).
	16. <i>B always carried the knife with him.</i>
17. a. B contradicted himself. (38–53) b. B's bias.	17. B's testimony (53).
4. <i>Possession of a knife of this kind is in itself suspicious</i> (104).	
5. The knife was a deadly weapon (35), a dagger (151), a stabbing instrument (151), a dreadful weapon (132).	18. The knife was an ordinary sheath knife used for many purposes (53).
6. a. The knife (exhibit 1.34).	6. b. The knife (exhibit 1.34).
7. The evidence of the wounds (22–23).	19. B's testimony (implicit, 53).
	20. Foster's (tool merchant's) testimony (32).
8. The knife was not a convenient thing to carry about (132, 137).	21. The knife fitted conveniently in the inside pocket of B's overcoat (137).
	22. B's testimony (implicit, 53).
23. [Nothing is known re size of coat.]	23. The coat (exhibit 29).
9. B purchased the knife in order to kill P.T.	24. B purchased the knife for an innocent purpose.
	25. B purchased the knife over a year before the attack. 20. Consistent with Foster's testimony above.
10. No evidence that B showed it to anyone (132, 139).	10. a. No reason why B should have shown it to anyone (137).
11. <i>If he had possessed it for long, there would have been evidence of jocular remarks</i> (132).	
26. a. B's bias b. No corroborating evidence (132).	26. B's testimony (39, 53, 110).
12. B. was a ship's clerk, not a sailor (editorial intervention!) (110).	27. <i>It is not strange for a seafaring man, visiting foreign countries, to purchase a knife</i> (110, 140). 28. B took the knife abroad with him. 29. B's testimony (53).
13. <i>No reasonable man living in London carries a knife like this in his pocket</i> (140).	30. <i>There are few sailors who do not possess a knife</i> (110, 140).

Source: T. Anderson, D. Schum, and W. L. Twining *Analysis of Evidence* (Cambridge: Cambridge University Press, 2005), Figure 10.1, p. 268.

- * This essay was first published in Twining and Hampsher-Monk (eds.) *Evidence and Inference in History and Law* (2003) and is reproduced here with the kind permission of Northwestern University Press and René Weis. Parts 1 and 2 of this chapter are abbreviated versions of chapters 8 and 9 of the first edition of *Rethinking Evidence*. A great deal of detail, including bibliographical material, has been omitted, but the original text is reproduced almost verbatim except where otherwise indicated. Extensive extracts from the record of the trial of Bywaters and Thompson are reprinted in ch. 7 of *Analysis* (2005).
- 1 *Rethinking Evidence* (1990), ch. 9.
 - 2 Koestler (1956).
 - 3 Young, *Trial* (1923) (hereafter ‘*Trial*’).
 - 4 Twining contests this.
 - 5 Weis (1988/2001) (hereafter *CJ*).
 - 6 *Trial* (1923).
 - 7 See above 12 n. 15. See further, *Analysis* (2005) ch. 5.
 - 8 See 389 below.
 - 9 For a chart of the ultimate and penultimate probanda and the main points of attack on the prosecution case see Appendix 4 below 389.
 - 10 I.e., before the publication of *CJ*, and not using any of the new evidence produced by Weis.
 - 11 In my experience, law students find it difficult to separate the original event (in this case the killing of Percy) from the subsequent legal proceedings dealing with that event. Hence they sometimes conflate two separate ideas involved in a miscarriage of justice: the fairness of the proceedings and the strength of the evidence about the original event. There is a third intermediate meaning: given the evidence before the court, the decision to convict or acquit was not justified. For example, some lawyers believe that O. J. Simpson was as a matter of historical fact guilty of the murder of Nicole Brown Simpson and Ronald Goldman, but that the evidence adduced at the criminal trial did not satisfy the standard of proof beyond reasonable doubt. Many laypersons find it difficult to understand how Simpson could be acquitted in the criminal case but be found to have committed the murder in the subsequent civil action. Surely one of the verdicts must have been wrong? From a legal point of view, it may be that both verdicts were correct: the standards of proof are different, the evidence adduced was not identical, and it is the duty of the jury to decide on the evidence presented to them. On O. J. Simpson, see *Analysis* (2005) at 117–20. In respect of Edith Thompson we are concerned here with her historical guilt independently of what happened at the trial, which is mainly relevant as a source of evidence – for example, Edith’s and Freddy’s evidence on oath.
 - 12 What has to be proved by the prosecution in a criminal case is prescribed by substantive law. For example, the law of murder prescribes the ingredients of the crime, each of which has to be proved beyond reasonable doubt. The facts to be proved are variously known as ‘material facts’, ‘facts in issue’, or ‘facta probanda’. In the present context, these terms are interchangeable.

- 13 'You will not convict her unless you are satisfied that she and he agreed that this man should be murdered when he could be, and she knew he was going to do it, and directed him to do it, and by arrangement between them he was doing it. If you are not satisfied of that you will acquit her; if you are satisfied of that it will be your duty to convict her.' (*Trial* (1923), 155). Cf. 127, where Mr Justice Shearman interrupted the closing speech for the prosecution to say, in respect of incitement, 'It is necessary, of course, to be careful of words, and I do not feel inclined to take the matter at large.' In the context this was interpreted by the Solicitor-General to mean that the 'persuasion' lasted right up to the murder (128), but both gloss over the distinction between planning this attack and killing when an opportunity arose.
- 14 For some legal doubts about the meaning of 'incitement' at the time, which further complicate the analysis, see 272–3. For a discussion of the law on incitement, see the first edition of this book (1990) at 272–3.
- 15 At several points the Solicitor-General made it clear that either incitement or conspiracy was sufficient (e.g., *Trial* (1923) 17, 132–3).
- 16 On the distinction between 'stories' and 'theories' and their relationship, see above 288–93
- 17 See, generally, Gaskins (1992).
- 18 One may note in passing that there is a possible counter-theory to the broken chain argument – what one might call the unexploded bomb theory. Briefly, this theory holds that, even if only the early letters are evidence against Edith of conspiracy or incitement or attempted murder, and that at the time Freddy did not consciously take them seriously, nevertheless they had the effect both of sowing the idea and working on his emotions at the level of his subconscious so that he was like an unexploded bomb which was detonated in a moment of stress some time later. This theory raises some interesting questions about Edith's legal responsibility, if it is correct; but since it was neither raised at the trial nor has it been seriously canvassed in the literature, I shall not pursue it further here.
- 19 Wigmore *Science* (1937), 858.
- 20 See *Analysis* (2005), 336–7.
- 21 *Trial* (1923), xvii; see now *CJ*, *passim*.
- 22 Weis is an exception.
- 23 On the uses and limitations of this approach see *Analysis*, at ch. 5 also *TEBW*, at 179–86.
- 24 See 388–9 below.
- 25 See n. 18 above.
- 26 See 353–4 below.
- 27 For page references see appendix 5 below at 390.
- 28 *Trial* (1923), 110n., cf. 140 (Shearman J.).
- 29 See appendix 5, below at 390.
- 30 *CJ*, 171–2.
- 31 The most relevant shared values are that we are both opposed to the death penalty (Weis emphasizes that his book is not primarily a polemic against capital punishment; *CJ*, xii). We would firmly uphold the criminal standard of proof beyond reasonable doubt and have a general sympathy for Edith.

- 32 This analysis on *Criminal Justice* is based on the text of the first edition (1982), before we had exchanged views and possibly influenced each other. The second edition (2001) has a new preface, but the text is essentially the same. Unless otherwise indicated, the page references are to the 2001 version.
- 33 CJ, Preface at xi. The tone of the Preface to the 2001 edition is more assertive.
- 34 *Analysis* at 115–16, 124–5.
- 35 On the dangers of generalizing ‘about the historian’ see above ch. 4. Twining’s standpoint in ‘Anatomy’ could be characterized as that of a student of Wigmorean analysis who is adopting the vantage point of a historian (i.e., operating in a context of free proof) and considering the question, ‘Was Edith guilty as charged?’ Weis adopts a similar vantage point with regard to this question, but without the explicit methodological concern.
- 36 On sources, see *CJ* (2001), 317–20. By comparison, Twining’s efforts hardly count as historical research. He has read most of the secondary literature (but only a few newspaper reports), and he has focused almost exclusively on the published versions of the proceedings (trial and appeal) and of Edith’s letters. He has had access to some additional primary and secondary legal sources, but agrees with Weis’s judgement that most of the prior secondary literature (with one possible exception, Fenton Bresler’s *Reprieve* (1965)) adds little to Filson Young’s volume. He also agrees, that ‘[t]he most authentic tribute to Edith Thompson remains F. Tennyson Jesse’s *A Pin To See the Peepshow*’ (1934) (*CJ*, 320), although he is more sceptical than Weis about its closeness to the likely historical truth. The potential significance of some of Weis’s new evidence will be considered below. Weis relies heavily on Spilsbury’s testimony (and notes) to support the thesis that if Edith had tried to poison Percy that fact would have emerged in the postmortem (*CJ*, 215–16, 226–7, 244). He does not consider Bresler’s argument that Spilsbury’s case card contains the statement ‘no substance found to account for the fatty degeneration of organs’. This implies that Spilsbury suspected poison. Twining is sceptical of Bresler’s thesis and, on the basis of the ‘broken chain theory,’ argues that even if Edith had really attempted to murder Percy this would not lend other than indirect and weak support to the prosecution’s case on the first indictment. The proposition that Spilsbury suspected poison would not, however, be entirely irrelevant, for it could be argued that Edith had attempted to murder Percy because (a) she wished Percy’s death; (b) she was capable of intent to murder; or (c) there was a continuing series of attempts to murder Percy. Browne and Tullett (1951) suggest that Spilsbury believed Edith to be innocent (259, 267).
- 37 *Trial* (1923), 133–56, discussed above 351.
- 38 *CJ* (1988), Preface ix–x; *CJ* (2001), 215–16. Edith’s supporters believed that Spilsbury’s testimony would be sufficient to exonerate her (e.g., 216, 226–7, 271). Even if this testimony is given the most favourable interpretation, however, it does not on its own destroy either the conspiracy or incitement theories.
- 39 Above n. 18. Some support for the exploding bomb hypothesis can be found in *CJ*’s sources, e.g. 39–40 (impulsive action of Bywaters in jumping ship); 177–87; 289 (‘I lost my temper . . . I just went blind and killed him’ – Bywaters to his mother just before his execution).

- 40 Edith's counsel, cited by Broad (1952) at 219 and Dudley (1953) at 123. Cf. Weis on Shearman (*CJ*, 246), the jury (247–8), the Court of Criminal Appeal (260–1), *et passim*.
- 41 See especially *CJ*, 58–9, 104–8, 112–3, 141, 148.
- 42 Especially on *The Fruitful Vine* (see *CJ*, 147–50) and *Bella Donna* (see *CJ*, 140–1). These were romantic novels written by Robert Hichens in 1911 and 1909, respectively. They were not generally perceived as trashy at the time, notwithstanding the judge's view of them. Henry James, for example, admired Hichens, and the novels were regularly reviewed in prime spots in *The Times*.
- 43 It would still be necessary to show that these communications were made with criminal intent.
- 44 Exhibits 15a, 15b, 15c, 15d, 20a, 21a, 22a, 22b, 55a. Those relating to the death of the parson, Henry George Bolding (15a, 15b), had a local interest because suspicion fell on Dr Preston Wallis, a ship's surgeon, who had lived at Manor Park and had treated Edith (*CJ*, 4, 83–4, 89). The others do not have such specific explanations but need to be set in the context of a significantly greater number of clippings dealing with other topics. The innocent explanation of the Wallis's clippings might be challenged by Edith's comment: 'It might prove interesting, darlint I want to have you only I love you so much try and help me Peidi' (*Trial* (1923), 171, exhibit 15); the same letter includes two clippings about poisoned chocolates being sent to the Vice Chancellor of Oxford University (15c). See also n. 55.
- 45 Exhibit 15. Weis acknowledges that in this letter Edith hints how easy it would be to murder her husband (84–5), but dismisses her remarks as 'silly'.
- 46 Weis's version of events includes the thesis that Edith twice became pregnant by Freddy, she suffered a miscarriage, and that some of the passages about poisons or medicines refer to abortifacients (*CJ*, 68–74, 101–2, 124). If these interpretations are true this disposes of more sinister readings of some, but not all, of the early letters. The arguments for and against Weis's readings are too complex to deal with here.
- 47 See n. 43.
- 48 Cf. Weis's use of the fact/fantasy theme, discussed below 375–6, 380–2.
- 49 Chapter 6.
- 50 E.g. *CJ*, 75–8, 110–11, 132, 136, 143, 161.
- 51 The argument for excluding some of the early letters was put by Curtis Bennett (*Trial* (1923), 3–6). This was rejected by Mr Justice Shearman and by the Court of Criminal Appeal. The Lord Chief Justice pointed out, rightly in Twining's view, that there was 'more than one ground on which the use of these letters could be justified' (259). It is a matter for speculation whether a court today would be willing to exclude some of the early letters on the basis that their prejudicial effect outweighed their probative value (see Police and Criminal Evidence Act 1984, s. 78).
- 52 On the second indictment see *Trial* (1923), 296. Edith seems most vulnerable on the second and third counts (Soliciting to Murder and Inciting to Commit a Misdemeanour), particularly in respect of exhibit 15 (10 February 1922), and exhibit 17 (1[?] April 1922), especially the 'Marconigram' passage, discussed 375–6, 380–2.
- 53 Exhibit 60.

- 54 *CJ*, 168–72, 241, 246–7.
- 55 *Ibid.*, 171–2.
- 56 *Ibid.*, 172.
- 57 Weis also makes some valid points about more serious misuses by the Crown of other passages in exhibit 60 and of other evidence, e.g., *CJ*, 171, 241, 245–6.
- 58 *Ibid.*, 174–87.
- 59 *Ibid.*, 179. The fact that the sheath was not recovered may have contributed to the impression that this was a ‘dreadful weapon’ (*CJ*, 207).
- 60 *Ibid.*, 174.
- 61 *Ibid.* 177–8.
- 62 *Trial* (1923) 70.
- 63 *CJ*, 178–9, 206–7, 224.
- 64 *Ibid.*, xi.
- 65 ‘Lawyers’ Stories’, above ch. 10.
- 66 Exhibit 17 was dated 1 April (*Trial* (1923), 179). Weis convincingly argues that it is more likely to be 10 April (personal communication) because the earlier date does not fit in with his reconstruction of events of this period. The letter is *prima facie* one of the most damaging to Edith, so incorrectly dating it is particularly significant.
- 67 Weis points out that quinine was considered an abortifacient, but not a poison, although Edith may not have known this (*CJ*, 86, 92). Another possibility is that ‘quinine’ was a code word for something more sinister, but this is conjectural. I find it difficult to make sense of the quinine passages.
- 68 *CJ*, 105.
- 69 *Ibid.*, 290 (cf. 312).
- 70 See *Trial* (1923), 95–6, where the most damaging passage in Edith’s cross-examination occurs:
- ‘It would be so easy darlint – if I had things – I do hope I shall.’
- What would be easy? – I was asking or saying it would be better if I had things as Mr. Bywaters suggested I should have.
- What would be easy? – To administer them as he suggested.
- ‘I do hope I shall.’ Was that acting or was that real? – That was acting for him.
- You were acting to Bywaters that you wished to destroy your husband’s life? – I was.
- By MR. JUSTICE SHEARMAN – One moment, I do not want to be mistaken. Did I take you down rightly as saying, ‘I wanted him to think I was willing to take my husband’s life?’ – I wanted him to think I was willing to do what he suggested.
- That is to take your husband’s life? – Not necessarily.
- Cross-examination continued* – To injure your husband at any rate? – To make him ill.
- What was the object of making him ill? – I had not discussed the special object.
- What was in your heart the object of making him ill? So that he should not recovetake from his heart attacks? – Yes, that was certainly the impression, yes.
- The Court adjourned.
- 71 See Edith’s admission above, n. 70. Weis places great weight on Spilsbury’s pathological evidence that there was no evidence of poison having been administered to Percy. Assuming that this is correct, this does not dispose of the hypothesis that Edith was

claiming to have been trying to poison him in order to persuade Freddy to “risk and try” too (*Trial* (1923) 60, 63, 79, 94). Weis does not deny this.

72 *Trial* (1923), 183 and testimony of Edith and Freddy. It seems that Weis does not doubt that these incidents occurred, but gives them an innocent interpretation.

73 *CJ*, 105.

74 E.g. 104–5.

75 *CJ*, 293.

76 Above, 376.

77 Below, 385.

78 *Trial* (1923), 183.

79 *CJ*, 168–72.

80 *Trial* (1923), 151.

81 Exhibit 17, see Appendix 2.

82 *CJ*, 105.

83 From, *Trial* (1923), 183.

84 *Ibid.*, 214–15. The date of this letter is stated in *Trial* to be 3 October 1922, the day before the murder. The prosecution suggested that the meeting in the tearoom took place on Monday, 2 October. Weis (*CJ*, 171–2) argues convincingly that it was written before 5 p.m. on Monday and that the meeting in the tearoom took place on Friday, 29 September.

The *Ratio Decidendi* of the Parable of the Prodigal Son¹

MORAL

A Respectable Family taking the air
Is a subject on which I could dwell;
It contains all the morals that ever there were,
And it sets an example as well.

(Hilaire Belloc, 'F is for Family')²

The purpose of this essay is to explore whether theological writings about parables can throw any light on reading and interpreting reported cases at common law. The concept of the *ratio decidendi* seems rather like the 'moral' of certain kinds of story or 'the point' of a parable. And questions about how to determine a *ratio* are at first sight analogous to questions about interpreting stories and parables. The most obvious link is that they concern *particular* events (real, fictional, stipulated, or hypothetical) that are considered to have *general significance*. But how close are the analogies between reported cases at common law and parables and other kinds of stories? Can consideration of parables (and the vast theological literature about them) throw any light on 'the problem of the *ratio decidendi*'?

I was stimulated to think about the question by an incident in a class on evidence. The case we were studying mainly concerned disputed questions of fact, but as I have argued elsewhere, stories play similar roles in arguments about questions of fact, and questions of law, and tend to be subversive of artificially sharp distinctions between fact and law and fact and value.³ The discussion centred on the relevance of the parable of 'The Prodigal Son', which occupies in theology a place similar to *Donoghue v Stevenson* in the literature on precedent.⁴

I am not sure when I was first introduced to the parable of the Prodigal Son, but for as long as I can remember I was vaguely perplexed and even disturbed by it. What does it mean? Is it a nice story? Is the point that forgiveness trumps justice? That repentance pays? That one loses out if one stays at home with one's parents? Or merely that reconciliation warrants a celebration? I now realize that I had tended to identify with the elder son who, having stayed at home helping his father and carrying out his filial duties, finds that it is his no-good brother who has been rewarded. The father's reply did not seem to me to meet the charge of unfairness.

I was led to reconsider this view after a discussion in a class on Analysis of Evidence. I regularly use *In Re the Estate of James Dale Warren, Jr* as a vehicle for detailed analysis and construction of arguments about questions of fact.⁵ This simulated case concerns a contested Will executed by James Dale Warren, Sr in a nursing home on the afternoon of his death. This new Will purported to leave almost all of his estate to his son, James Dale Warren, Jr, who had been estranged from him for most of his life, but had been recently reconciled with him. He had assiduously attended his father during the last three days before he died. The effect of the Will, if valid, would be essentially to disinherit his only daughter, Susan, and her two children. Susan had lived with her father in his home during his last years until she felt that his medical condition required transferring him to a nursing home. James Sr may have resented the transfer, but otherwise there was little evidence of any serious rift between father and daughter; and there was convincing evidence that James Sr adored his grandchildren for whom his house was the only home they had known. Unfortunately for Susan, she had been involved in a road accident a few days before her father's death and had stayed away for fear that her injuries might upset the old man. Unknown to her, James Jr had stepped into the breach and was in attendance while his father wrote the new Will. Susan contests the Will on two grounds: (1) that the testator lacked testamentary capacity at the time of execution of the new Will; and (2) that the Will was made under the undue influence of James Jr, the principal beneficiary. The main issues are factual.

In the context of a mock trial counsel for each party are asked to develop persuasive 'theories' and 'themes' to support their case.⁶ It is hardly surprising that counsel for Susan regularly develop a Dickensian image of grasping relatives fawning over a dying man. It is no more surprising that the other side counters with the parable of the Prodigal Son.

On the occasion in question, in an American law school, before assigning roles I asked the class to discuss what themes might usefully be developed in the case. As usual, the Prodigal Son was the first suggestion. However, at this point the discussion took a surprising turn. Let me try to reconstruct the exchange in the form of an imaginary dialogue:

- | | |
|------------|--|
| WLT: | Which side does the parable help? |
| Student 1: | The son, of course. |
| WLT: | Why? |
| Student 2: | Because it is natural for a father to be generous after reconciliation with a long lost son. |
| WLT: | Is that the moral of the original parable? |
| Student 3: | It could be about repentance and forgiveness. That still helps James Jr. |
| WLT: | Are you suggesting that a story from the New Testament is evidence of how fathers behave in twentieth-century America? |

- Student 2:* No. But it does support the proposition that this is reasonable behaviour on the part of the father, therefore he was not behaving irrationally.
- WLT:* Is that not inferring an 'is' from an 'ought'?
- Student 1:* Well, the story sets out a familiar model of how good fathers do and should behave, like 'best practice'.
- WLT:* Again, is that evidence?
- Student (chorus):* Yes.
- WLT:* Have you read the original text of St Luke's Gospel?
- Students 1 and 2 (abashed):* Well, not recently.
- WLT:* (*meanly producing the text and circulating copies from the St James' version*):⁷ Look, the father, in responding to the elder son's complaint, explicitly says: 'Son, thou art ever with me, and all that I have is thine.' (LUKE 16: 5, 31.) In other words: 'I am not disinheriting you. I am only throwing a party to celebrate.' Surely, that helps Susan.
- Student 4:* That's pedantic. The popular image of the story makes it out to be about reconciliation and forgiveness and generosity. It is the image rather than the text that will have resonance with the jury. So it does help James Jr.
- WLT:* Is that rational?
- Student 1:* Counsel for Susan can point this out, if counsel for James Jr tries to use it . . .
- (The dialogue continued).⁸

This is, of course, an idealized construction of the behaviour of both teacher and students. The original incident stimulated me to think further about the roles of theories and themes in argument about questions of fact. I also started thinking more seriously about the parable. I reread St Luke's Gospel and dipped into some of the theological literature about the Prodigal Son and parables generally. This suggested that there might be some illuminating analogies between jurisprudential discussions of precedent and theological discussions of parables. Here I confine myself to possible analogies between debates about 'the point' of parables and about determining the *ratio decidendi* of a case, with particular reference to the Prodigal Son.

Cases and parables as texts

On a first reading of a small part of the theological literature it becomes obvious that there appear to be striking analogies between discussions of parables and of cases at common law.⁹ Both involve particular instances with potential general significance. Both are associated with 'authority', but in different ways. Theologians as well as

lawyers have dabbled in literary theory.¹⁰ There are analogous patterns of difference about emphasis on original intent, text, context, and reader response. Terms such as ‘exegesis’ and ‘hermeneutics’ have found their way into juristic literature. However, further consideration suggests the differences may be at least as significant.

The *Oxford English Dictionary* lists fourteen primary meanings of the word ‘case’ (*et casus*), including an event, a chance, an instance or example of the occurrence of an event or the existence of a thing, and the actual state or position of matters. It lists six uses in Law under the general rubric of ‘the state of facts juridically considered’, including: (a) a cause or suit; (b) a statement of the facts of any matter *sub judice* drawn up for consideration by a higher court (as in case stated); (c) a cause which has been decided, including a leading case [and] a precedent; and (d) an argument (the sum of grounds on which [one of the parties] rests his claim).¹¹ Here, then, we are mainly concerned with cases-as-precedents, but also with cases-as-examples, and cases-as-arguments.

Cases-as-precedents and parables are both embodied in texts, in the narrow sense of writings in fixed verbal form.¹² When lawyers read or cite cases, we are in fact referring to a particular kind of document or text – a law report. When we read the Parable of the Prodigal Son ‘in the original’, we are typically reading a translation of St Luke’s account of Jesus telling a story. The authenticity, accuracy, and reliability of each text are not the same, but both are treated as authoritative.¹³ A law report contains the *ipsissima verba* of each judge; St Luke’s account is at best hearsay. Modern law reports follow a standard form; the Gospels are freer-flowing. Nevertheless both texts are treated as primary and authoritative, though in different ways.

Keeping in mind the differences between the texts, it is interesting to compare two standard definitions of parables and cases-as-precedents. C. H. Dodd advanced the following account of New Testament parables, ‘At its simplest the parable is a metaphor or simile drawn from nature or common life, arresting the hearer by its vividness or strangeness, and leaving the mind in sufficient doubt about its precise application to tease it into active thought.’¹⁴

Theologians differ about the nature of parables. In my preliminary reading I have found suggestions that a standard parable, or a particular one, should be viewed as a metaphor, an allegory, an ‘example story’, a lesson (providing insight rather than a ‘moral’), an analogy, an argument, a conundrum, or a morality tale.¹⁵ These are not all necessarily incompatible, but some lead to profound differences of interpretation. If by ‘morality tale’ is intended a story with a specific ‘moral’ that can be articulated as a normative proposition, I would contest that interpretation. However, if the term is taken to mean a story that belongs to the general sphere of moral discourse, broadly interpreted, then ‘morality tale’ can encompass all, or almost all, of these different conceptions.

For example, if the main point of the Prodigal Son is interpreted as providing an insight into the nature of God’s love (lesson) or, alternatively, as Jesus’ indirect justification for consorting with sinners (argument), both interpretations fit within

a broad conception of 'morality tale'. One of the main differences between commentators relates to the appropriateness of thinking of 'the point' as being expressible in the form of a proposition.¹⁶ Similarly, cases-as-precedents, cases-as-examples, and cases-as-arguments are all concerned with normative discourse. To what extent and how a case can be interpreted as authority for, or as an example of, an identifiable, articulated proposition of law is in part what is at issue in 'the problem of the *ratio decidendi*'.

Dodd's definition is contested, but is often treated as fairly representative. It is interesting to contrast this with a well-known American definition of a reported case:

A case is the written memorandum of a dispute or controversy between persons, telling with varying degrees of completeness and accuracy, what happened, what each of the parties did about it, what some supposedly impartial judge or other tribunal did in the way of bringing the dispute or controversy to an end, and the avowed reasons of the judge or tribunal for doing what was done.¹⁷

These two formulations, if treated as reasonably representative, bring out some differences and similarities between New Testament parables and reported cases. Dodd's account stresses four aspects of parabolic language: (a) its poetic and metaphoric quality; (b) its realism; (c) its paradoxical and engaging quality; and (d) its open-ended nature.¹⁸

One might say of reported cases that they are (a) prosaic rather than poetic; (b) realistic in the sense of being close to actual events (though not necessarily confined to everyday life); (c) dialectical rather than paradoxical; and (d) although they may engage attention, that is not their primary purpose or characteristic. The most important similarity is that there are leeways for interpreting the general significance of both cases and parables, but within constraints imposed by text and context. Thus the main point of comparison is the room for interpretation of the general significance of an account of a particular event or situation. One might add that narrative plays a major role in both types of account.¹⁹

The American definition of a reported case cited above brings out some further differences in that the law reports follow a uniform format and typically contain standard ingredients: facts (particular) giving rise to a disputed question of law (general), culminating in a decision (both particular and general) backed by a reasoned justification. Parables differ from cases in that issues are not always sharply framed (what was the issue in *The Prodigal Son*?); no decision is involved; nor is a reasoned justification for the conclusion necessarily articulated. The absence of precisely-framed issues and of explicit justifications may leave parables a bit more open-ended in respect of interpreting their general significance, but this difference could be exaggerated. Similarly, the fact that a case involves a final decision on a particular dispute does not affect the problem of interpretation of its general significance. Precedents have direct practical effects both on the immediate dispute and beyond it. The practical effects of theological and literary texts are less easy to

pinpoint. Both parables and cases are authoritative in quite similar ways at a general level.

The *ratio* of a case and 'the point' of a parable

As Simpson rightly pointed out in an early essay, it is important to distinguish between the meaning of the term '*ratio decidendi*' and the problem of determining the *ratio decidendi* of a given case.²⁰ From the extensive literature on the topic, five different definitions or usages of '*ratio decidendi*' can be singled out:

- 1 The rule(s) of law explicitly stated by the judge(s) as the basis for decision (the explicit answer(s) to the question(s) of law in the case).
- 2 The reason(s) explicitly given by the judge(s) for the decision (explicit justification for the decision).
- 3 The rule(s) of law implicit in the reasoning of the judge(s) in justifying the decision (the implicit answer(s) to the question(s) of law in the case).
- 4 The reason(s) implicitly given by the judge(s) for the decision (the implicit justification for the decision).
- 5 The rule(s) of law for which the case is or can be made to stand or is cited as authority by a subsequent interpreter (the imputed answer(s) to the question(s) of law in the case).²¹

In ordinary legal usage the term is used quite loosely and, even in jurisprudential debate, each of these usages has its supporters.²² All five notions have a place in legal discourse and legal reasoning: explicit rule-statements, implicit propositions of law, explicit and implicit justifications for a decision, and imputed propositions of law, are all used by subsequent interpreters of cases-as-precedents and in other contexts. For present purposes it is sufficient to note, first, that the term is ambiguous and does not have one settled usage; and, secondly, that in the first four usages the *ratio* is treated as being embodied in the text and therefore does not change over time, whereas in the last usage the *ratio* can change over time.

Given the ambiguity of the term and the variety of contexts in which it is used there is some doubt as to whether it is a useful concept.²³ I have argued elsewhere that the fifth usage is the most useful because it links the concept of *ratio* more closely to interpretation and use of past precedents: if and only if interpretation of cases involves reading the text of each case in isolation can any of the first four usages fit this context.²⁴ Since neither theory nor practice precludes interpreting precedents in the context of prior and subsequent cases, legal developments, and other factors, there is no such self-denying rule of interpretation.

The first four usages apply to the context of *justification*, for example from the standpoint of the original judge or someone rationally reconstructing the arguments in the case, but not in most contexts of subsequent *interpretation and use*.²⁵ The fifth usage is more realistic here because (a) different interpreters use cases as part of their arguments on questions of law in significantly different ways: there are, for example, appropriately cautious and bold interpreters;²⁶ (b) a single precedent is

normally interpreted in the light of other precedents and other contextual factors; (c) the conditions giving rise to doubt in interpreting a prior precedent also change over time:²⁷ texts are fixed, but interpretations change.

Within theology there is much debate about whether the interpretation of parables can and should change over time. Clearly the perspectives, techniques, and situations of interpreters vary according to time and place, but the divine origin of the text naturally makes for greater emphasis on 'original intent'. There are fewer possibilities for authoritative interventions between reader and text than in the common law; even an authoritarian church does not typically claim to overrule, reverse, limit, modify, or otherwise change the original text.²⁸ Despite this powerful constraint, even a cursory glance at the theological literature of any religion shows how much scope there is for differing interpretations of parables and other religious texts. For example, the relevance of changed social and other conditions to such interpretations is, of course, a central issue in Islam and Judaism as well as in Christianity.

The usages of '*ratio*' (1, 3, and 5) which identify it with propositions of law (principles, rules, or rule-fragments) suggest a close analogy between precedents and stories with 'morals' that can be expressed as propositions. Both involve the extraction of general normative propositions from accounts of particular events. Parables are often treated as morality tales in the narrow sense. This was my assumption before I looked into the theological literature. There one finds that searching for a 'moral' is sometimes challenged as superficial or simplistic. Without going very deeply into the theological debates one can identify a variety of positions on the interpretation of parables. These include propositions that:

- 1 *A parable may be intentionally polyvalent: the audience is deliberately left to draw its own moral or point from the story.* On this view, it is within the spirit of the genre that different audiences at different times and places should interpret the text differently. This position does not necessarily involve a commitment to radical indeterminacy or to 'the death of the author', because constraints may be put on the range of interpretations: e.g. an interpretation may be treated as only being acceptable if it 'fits' the text or takes due account of what is known of the historical context or the background beliefs of the original audience. On this view, the fact that there are multiple interpretations of the Prodigal Son can be treated as a strength rather than a weakness.
- 2 *Even if one gives weight to 'original intent', it does not follow that a parable has only one 'point'.* The significance of the Prodigal Son varies, e.g. according to how much one focuses on the prodigal, the father, or the elder son. There is no good reason why a parable or other story need have only one 'point'.²⁹
- 3 *If by 'point' is meant 'the important or essential thing' (e.g. the point of the matter) or 'the salient feature of a story, epigram, or joke' (e.g. 'he missed the point'),³⁰ the idea need not be confined to a 'moral'.* For example, the point may be an insight or lesson (e.g. about the nature of God's love); or an argument (the Prodigal Son was Jesus's way of justifying his association with publicans and sinners);³¹ or a conundrum (how should the elder son behave?);³² or a way of challenging some taken-for-granted assumption (the father

flouted convention by *running* out and embracing the prodigal *before* he had declared his repentance and by treating him as an honoured guest).³³ All of these may have an evaluative dimension, but they are not the same as a 'moral' in the form of a moral rule or principle.

- 4 *Parables may also be viewed as metaphors or allegories that communicate indirectly, by powerful images, ideas that cannot adequately be expressed in propositional form.*³⁴

The parable of the Prodigal Son has a powerful hold on people's imaginations that may be quite different from the impact of an articulated general proposition. Often, to spell out a point or a moral may spoil a story.

This list could be extended considerably.

At first sight, only some of these ideas seem to fit reported cases. But the idea of the *ratio decidendi* is only significant, if ever, in the context of one way of reading and using cases, that of extracting propositions of law from them. One can, of course, read cases for many other purposes: as examples of judicial style or as historical responses to immediate problems (as Simpson does); to identify judicial values or biases; to deconstruct the reasoning; or to provide raw material for substantive arguments.³⁵ The concept of '*ratio*' has little or no relevance to such readings.

Conversely, one can read and use parables for their 'morals,' but many theologians do not consider this to be the primary use. Here the theological literature is suggestive in reminding us that there are other uses of cases in addition to their being treated as authoritative sources of normative propositions.

Interpretation, standpoint, the power of the particular, and conditions of doubt

Ronald Dworkin has developed the idea of interpretation as making a text 'the best it can be'.³⁶ This fits some contexts better than others. It generally fits the production of a play or conducting a symphony, or texts with alternative endings; it fits legal contexts, especially where the interpreter is participating in the legal system and, for example, is in a relationship of cooperation with the originator of the text or subscribes to the system's basic principles. However, Dworkin's conception of interpretation does not comfortably include a hostile critic of a book or other artefact, a straight historical account of the origin of some text, or an attempt to 'deconstruct' it.

In legal contexts it would be odd to say that a tax consultant representing a taxpayer, or an advocate trying to limit or bury an adverse precedent, Holmes's 'Bad Man', or a member of a Law Commission considering the reform of a controversial statute, are trying to make each text 'the best it can be'. What is most appropriate for particular interpreters may be best for their purposes, and perhaps for the system as a whole, but hardly for every text they are called upon to interpret. Hostile interpretations do not necessarily involve uncharitable readings, or distortions, or non-reading of the text – though in practice they often do.³⁷

Dworkin's usage probably fits most contexts of theological interpretation of parables. Even so, in order to explain divergent interpretations of parables, one needs to differentiate between standpoints. A preacher using the story as an illustration in a sermon, a Sunday school teacher instructing ten-year-olds, a biographer of Jesus, a theologian trying to construct a coherent interpretation of Luke's Gospel, may have significantly different vantage points, roles, objectives, and interpretive resources. They may also have different theological theories. Similarly, what is the best interpretation of a precedent may be different for a legal historian, counsel for the prosecution in a criminal case, an appellate judge, and the writer of a student textbook, according to their context and purposes.

Interpretation is an activity that involves complex relations between interpreter, text (or other object of interpretation) and, indirectly, the originator(s) of the text. Interpretation is relative to the standpoint of the interpreter because the activity takes place in a given historical situation or context. Interpreters can have different vantage points, background assumptions, beliefs, interests, roles, resources, and immediate objectives.

As we have seen, puzzles about the *ratio decidendi* belong mainly to contexts involving reading cases as authoritative sources of law within a legal system rather than for other purposes.³⁸ In such contexts precedents seem like morality tales in that their significance lies in the general normative answers they give to questions raised by the story. So, for some interpreters, are parables. But, as we have seen, there are disagreements as to when, if ever, it is appropriate to express the moral or point of a parable in propositional form.

Precedents are reported mainly because they raise and purport to answer general questions of law. In the context of interpretation of precedents as authoritative sources of law, it is usually fairly straightforward to identify the question(s) of law raised by the case. The main doubts about interpretation relate to the level of generality at which the question(s) and answer(s) can be most appropriately formulated.³⁹ The facts, the issue(s) and the answer(s) to the question(s) are all intimately related, for the paradigm example of a single-issue case fits the following format:

<i>Facts:</i>	X happened (particular)
<i>Issue:</i>	If X happens/in situations of type X then what? (general)
<i>Answer:</i>	Whenever X happens, then Y (general). ⁴⁰

X is a constant, i.e. $X = X = X$. Typically the main doubt in interpreting a case relates to how X is characterized, especially the level of generality of X.

$X = X = X$ suggests one way in which parables and precedents are quite closely analogous. In both, particularity is a key source of their appeal. Why is this? Three different, but possibly complementary, answers may be suggested.

1 As John Wisdom pointed out in discussing case-by-case argument, there is an important difference between saying 'this is a clear case of X' and giving a general definition of X.⁴¹ This is because it is often easier to make confident judgements in specific circumstances

than to articulate a precise general rule or principle. Case-by-case decision can be easier than the formulation of general rules.

- 2 *Telling a particular story without articulating its general significance may be a matter of not crossing bridges before one comes to them.* But it may also be a matter of giving more leeway to subsequent interpreters to draw their own conclusions or to make their own choices. At common law the practice of treating the result of a particular case as settled, but not according the same weight to the reasoning and articulated rule formulations of the judges in the case also has the effect of leaving some leeway for future interpreters, perhaps somewhere between weak and strong discretion.
- 3 *Explicit, propositional moralizing may be too intellectual and may tend to cut down the scope for the role of intuition and imagination in making judgements.*⁴² Child psychologists tell us that indirect story-telling may have a greater impact on children in moral education than explicit moralizing or articulating the morals of stories. Perhaps this was what Belloc was satirizing in his *Cautionary Tales*. Stories are easier to grasp and to remember than abstract principles, but they also, as Dodd suggests, tease the hearer into active thought. They also more readily grip the imagination.

Thus the power of the particular narrative lies in: (a) combinations of factors that make for clear cases and confident judgements in particular circumstances; (b) allowing leeways for subsequent interpreters to make their own choices; and (c) avoiding over-intellectualization of judgements.

There are therefore some suggestive analogies between parables and reported cases, including cases-as-precedents. But there are also some very significant differences between interpreting parables and precedents. Such differences become clearer if one considers what are the main conditions of doubt in respect of each genre. When a difficult problem of interpretation arises, it can be helpful to try to diagnose the problem by asking: *what factors are contributing to puzzlement or doubt in this situation?*⁴³ On the basis of the analysis so far, I suggest that there are at least five reasons why interpreting parables tends to be less straightforward than interpreting precedents. These can be restated as follows:

- 1 *The text:* there are more problems about establishing biblical texts than modern law reports in relation to authenticity, accuracy, reliability, and translation, especially in respect of what Jesus actually said.⁴⁴ Moreover, modern law reports follow a standard format which generally distinguishes clearly between primary material (e.g. the *ipsissima verba* of the judgments) and secondary ‘furniture’.
- 2 *The genre:* precedents are generally reported because they provide authoritative determinations of disputed questions of law. The ‘what’ of cases-as-precedents is more clearly defined than that of parables as a genre.⁴⁵ They have a formal quality as dispositive of previously unanswered questions of law.
- 3 *Standpoint:* both parables and reported cases are read and used by a variety of kinds of interpreters in a variety of contexts. However, in interpreting and using cases as authoritative precedents, the standard participant standpoints of judge, advocate, legal adviser, and expositor generally belong broadly to the same interpretive community, even if their roles, purposes, etc. may be different.⁴⁶ Some of these roles and purposes are

quite precisely defined. Readers of the Bible and people who cite, re-tell, or use parables are more numerous and diverse than readers of law reports. They may not have such clearly-defined roles. Perhaps the closest analogies in respect of standpoint are between biblical scholars and jurists in their role of exegetists or expositors of doctrine. But both these standpoints are quite problematic. Furthermore, legal and biblical exegesis are not identical activities. Most of the other legal actors who use precedents – such as judges, advocates, advisers – are typically mainly concerned with the context of interpretation of precedents in legal argumentation concerning the relationship of particular to particular, more than particular to general. This is probably less common in theology.

- 4 *Issue-posing*: the question(s) to which a parable it may be treated as giving an answer is often not determinate, e.g. the Prodigal Son could be interpreted as raising such different questions as: What is the nature of God's love? Why was Jesus justified in consorting with sinners? What is the relationship between repentance, forgiveness, and justice? One might say that parables do not fit as easily into a question-and-answer framework as do reported cases; or, alternatively, what questions one imputes to a parable depend on one's theory of parables. That cases are selected for reporting because they involved previously unresolved questions of law is not seriously disputed in the theory of precedent.⁴⁷ Given that the questions addressed by parables are often less determinate than for precedents, if indeed parables address questions, it is hardly surprising that the range of plausible interpretations for a parable does not operate solely or mainly on a single continuum of levels of generality.⁴⁸ Different kinds of questions invite different kinds of answer. And we cannot be as confident about treating parables as raising and answering questions as we can with precedents.
- 5 *Changing conditions and the status of precedents*: the relevance of changed social and other circumstances (including theories of interpretation) is problematic in theology. Nevertheless the status of the New Testament as an authoritative source is relatively constant. Interpreters of precedents, on the other hand, have to take account of new precedents, other legal developments, and other changed circumstances: precedents may be abolished by legislation, overruled, limited, extended, and so on. Changed conditions may raise doubts about the status or scope of a precedent or they may narrow or settle doubts: e.g. the scope and significance of the House of Lords's decision in the *Pinochet* case is likely to be much clearer in ten or twenty years' time than now, both as a precedent and as a historical event.⁴⁹

These five points suggest that interpreting cases-as-precedents as authoritative sources or supports for propositions of law is a good deal easier than interpreting parables. There are, of course, some special difficulties in regard to precedents, such as multiple judgment decisions, but by and large the conditions of doubt are more significant in biblical interpretation. This, I hope, may help to demystify precedent.

However, this modest venture into theology also reminds us that there are other significant ways of looking at reported cases in addition to or instead of solely considering them as authoritative precedents. The recent explosion of interest in literary theory within biblical hermeneutics may be more illuminating in regard to other ways of reading the law reports than to reading cases-as-precedents.⁵⁰

The *ratio decidendi* of the parable

Can lawyers' approaches to interpretation throw any light on a parable? For example, can one argue plausibly that there is a main point or moral of the Prodigal Son that can be extracted by combining juristic method and theological insights? In order to keep this simple, let us assume that the King James translation of Luke's account of Jesus's parable is an authentic and reliable primary source. My standpoint is that of a lay person, with a common law background, using scholarly commentaries to clarify my understanding of the meaning and significance of the parable out of general interest rather than for some specific purpose.

First, context: the text suggests that Jesus was responding to the Pharisees's complaint that he was consorting with publicans and sinners. The primary audience consisted of scribes and Pharisees and of the people with whom Jesus was consorting. There is some historical evidence about the background beliefs and attitudes of these two audiences. For example, it was not unusual for a younger son to emigrate, taking his share of the inheritance in advance.⁵¹ The Pharisees had clear ideas (rules?) about repentance and forgiveness, so there was nothing new or surprising about a father forgiving his son.⁵² But this father's behaviour was unconventional, perhaps shocking, in that he *ran* out to greet his son, embraced him *before* he had expressed contrition, and went *beyond* mere forgiveness to treat him as *an honoured guest* and to order a special feast in *celebration*. It would have been even more shocking if he had reduced the share of the elder son, but he did not do this. Rather he admonished him for putting concerns of merit above the joy of finding a lost sheep. The same chapter in Luke includes two other parables that also deal with the theme of rejoicing over repentance: the parables of the lost sheep and the lost piece of silver. There is even an articulated moral for the second parable: 'Likewise, I say unto you, there is joy in the presence of the angels of God over one sinner that repenteth.' (Luke 15: 10).

The textual and historical contexts considerably reduce the scope for interpretation. They tell us about the audience, what they would have taken for granted, and what was new. They pinpoint a central question that Jesus was addressing: why are you consorting with sinners? The previous parable explicitly identifies rejoicing at repentance as a central theme. Indeed, one might ask: with all these aids to interpretation, what is the problem? Yet this is the most debated parable in theological literature.⁵³

What then are the conditions of doubt? Some of the puzzles and disagreements relate to the status of the text, to its relation to the St Thomas's Gospel, and to the standpoints of different users, such as preachers and evangelists. I have eliminated these as sources of doubt for my purposes and concentrated on scholarly theological commentaries. The range of interpretations is still quite wide. How can this be?

One set of difficulties relates to genre. Is a parable an allegory, a metaphor, an argument, a conundrum, or what? Doubts arising from these nuanced differentiations surround questions like: should a parable be treated as having a single main

point or moral? Should such morals be appropriately articulated as ‘propositions’? Should the significance of a parable be treated as changing over time, and if so, to what extent? And, related to that, how much emphasis should be placed on ‘original intent’? Here the analogies with legal interpretation are quite resonant.

It seems to me that some of these doubts can be settled quite easily. Take, for example, the suggestion that the moral of the Prodigal Son depends on which of the three main characters is the main focus of attention. The repentance of the son and his hope that he would be accepted back, albeit in a lowly position, contain some lessons for prodigals. But the context suggests that the basic ideas were familiar and that the son’s behaviour and attitude did not provide an answer to the question posed by the Pharisees. So I would suggest that this could not be the main point of the story.

The behaviour and attitudes of the father are more striking. In his treatment of the prodigal, he provides a fresh and powerful role-model for compassionate fathers. One may also learn something about the nature of God’s love from this. However, the story does not end there and this suggests that, on its own, the father’s treatment of the prodigal is not the only point.

The elder son’s reaction and the interaction between father and son provide a third focus. I disagree with Kallas’s suggestion that the parable ends with a conundrum: how should the older son (and by analogy the Pharisees) behave?⁵⁴ For it seems clear from the context that, *in the circumstances of this case*, the father is implying that the only correct course of action is to join in the celebration wholeheartedly. A strong argument can be advanced to support the suggestion that the elder son represents the Pharisees and that his fault lay in being too legalistic. He had played by the rules and thought that he deserved to be rewarded. One can take the interpretation one step further and suggest that Jesus is implying that salvation depends on faith rather than on works. But this is not the only possible interpretation, and it may be reading too much into the parable. Suffice to say here that even if one accepts that the main point relates to the final exchange between father and elder son, it still leaves open such questions as: what precisely is the best interpretation of this exchange, and can it adequately be expressed in propositional form?

Rather than pursue this hare, let us make a lawyer’s move. Let us assume that we are persuaded by the parable about the appropriateness of the behaviour of the prodigal and of his father’s treatment of him, and the inappropriateness of the elder brother’s response in the circumstances. What if we vary the facts a bit?

Suppose the prodigal had not already repented: would it be appropriate for the father to treat him in exactly the same way, in respect of forgiveness, *and* a special welcome, *and* a celebration? Suppose the father had been even more generous and had given the repentant prodigal part of the elder son’s inheritance (or, like James Warren Sr, all of it)? What if the elder son later had further grounds for a sense of grievance, for example, that the younger son continued to be treated with special favour or was perceived to be exploiting his father’s generosity? Were the elder son’s obedience and good works irrelevant to his prospect of salvation or is it that

works alone are not enough? Prior repentance, unconditional forgiveness, and a celebratory party (but no more) are potential limiting factors regarding the scope of possible morals about forgiveness, repentance, and justice.⁵⁵ One or more such factors might provide a basis for distinguishing the original situation from some future one. Or they might not. On all these matters the parable is open-ended. In the specific context of justifying consorting with sinners, such issues do not arise. Maybe the original parable presents an easy case. On the facts this was a clear case of X, but it is indeterminate as to the general scope of X.

Lessons

What have I learned from this exercise? First, I have long felt that problems of interpreting legal texts are closer to theology than to literary theory. My first venture into theological scholarship has strengthened this view.

However, the differences between interpreting parables and precedents are as significant as the similarities. Like all analogies, this one could easily be pushed too far. Nevertheless, there is scope for further fruitful cross-disciplinary exchanges in this area. Perhaps because of the greater difficulties it has to deal with, the theological literature on parables seems generally more extensive and sophisticated than the juristic literature about precedents, not least in respect of hermeneutics and the relevance of literary theory. The benefits may be reciprocal, because lawyers' treatments on such matters as issue framing, relevance, materiality, and the use of hypotheticals might throw some light on theological puzzlements.

Secondly, this exercise has underlined the difference between routine and problematic readings of texts.⁵⁶ The nuanced differences between the various uses of the term '*ratio decidendi*' and some of the subtleties of the theoretical literature do not have much bearing on routine reading and using of cases-as-precedents. Similarly, most of us have read or heard parables and other Bible stories without any elaborate theological apparatus. My students adopted a cavalier attitude to the original text. I may have missed the main point of the Prodigal Son until now, if it has one, but it still said something about repentance and forgiveness. When genuine puzzlements or disagreements arise in respect of hard cases, clarification of standpoint, diagnosis of the conditions of doubt, and distinctions between ratio-as-rule, ratio-as-reason, reconstruction of arguments, and imputation are important tools.⁵⁷ Similar considerations apply in theology.

Thirdly, my understanding of the Prodigal Son has changed. I no longer consider it to be solely or mainly about reconciliation and forgiveness. Focus on the context narrows the range of plausible interpretations in two main ways. Historical knowledge is helpful in differentiating between what would have been familiar to the original audience and what would have been novel, surprising, or even shocking. The context also helps to identify one, perhaps *the*, central issue: how did Jesus justify consorting with sinners? The answer includes the ideas that the souls of sinners are as important as those of the righteous and that there is special reason for

rejoicing when a lost soul is ‘found’. However, even if one can formulate a clear central issue, there is still some indeterminacy about the answer to the question and the scope and meaning of the justification. The parable, on its own, leaves open the range of circumstances to which the answer or moral might apply. This is clearly illustrated by the limiters included in the story: prior and genuine repentance by the son; the interests of the elder brother not materially affected by the celebration; and it is not clear whether there were absolutely no conditions attached to forgiveness.

These, in the language of precedent, relate to the level of generality of the governing norm or principle. But, of course, there are other potential levels of meaning and this may be a legalistic and superficial way of reading the story. I had instinctively identified with the older son, who is often interpreted as representing the legalistic Pharisees. Now that I see this, I can empathize more with both the prodigal and the father. However, for me the parable still leaves unanswered some questions about justice.

Finally, despite significant differences between parables and cases-as-precedents, the analogies are illuminating. As mentioned above, the theological literature on parables is sophisticated and quite suggestive. For example, it reminds us that parables, like cases, are read and interpreted in many different contexts for quite varied purposes. Multiple perspectives have been brought to bear on parables. Some are familiar in jurisprudence, others are less so.⁵⁸ This exercise has stimulated me to reflect further on cases-as-precedents. It has in some respects confirmed or fortified my prior views, for example, on standpoint, conditions of doubt, and the use of ‘what if . . . ?’ questions. It has also led me to reconsider others: for example, whether attempting to formulate potential interpretations of precedents in propositional form within a framework of question-and answer may not be too intellectual.

There may be many other lessons. But rather than spoil my story by articulating a moral, I leave it to readers to tease out their own conclusions.

Appendix

St Luke, chapter 15

(King James Version)

- 1 Then drew near unto him all the publicans and sinners for to hear him.
- 2 And the Pharisees and scribes murmured, saying, This man receiveth sinners and eateth with them.
- [3–10] parables of the lost sheep and the lost silver]
- 11 And he said, a certain man had two sons:
- 12 And the younger of them said to his father, ‘Father, give me the portion of goods that falleth to me.’ And he divided unto them his living.
- 13 And not many days after the younger son gathered all together, and took his journey into a far country, and there wasted his substance with riotous living.

- 14 And when he had spent all, there arose a mighty famine in that land; and he began to be in want.
- 15 And he went and joined himself to a citizen of that country; and he sent him into the fields to feed swine.
- 16 And he would fain have filled his belly with the husks the swine did eat and no man gave unto him.
- 17 And when he came to himself, he said, 'How many hired servants of my father's have bread enough and to spare and I perish with hunger!'
- 18 I will arise and go to my father, and say unto him, 'Father, I have sinned against heaven and before thee,
- 19 And am no more worthy to be called thy son: make me one of your hired servants.'
- 20 And he arose, and came to his father. But when he was a great way off his father saw him, and had compassion, and ran, and fell on his neck, and kissed him.
- 21 And the son said unto him, 'Father, I have sinned against heaven, and in thy sight, and am no more worthy to be called thy son.'
- 22 But the father said to his servants, 'Bring forth the best robe, and put it on him; and put a ring on his hand, and shoes on his feet:
- 23 And bring hither the fatted calf and kill it; and let us eat, and be merry:
- 24 For this my son was dead, and is alive again; he was lost, and is found.' And they began to be merry.
- 25 Now the elder son was in the field: and as he came and drew nigh to the house, he heard musick and dancing
- 26 And he called one of the servants, and asked what these things meant.
- 27 And he said unto him, 'Thy brother is come; thy father hath killed the fatted calf, because he has received him safe and sound.'
- 28 And he was angry, and would not go in: therefore his father came out, and entreated him.
- 29 And he answering said to his father, 'Lo, these many years did I serve thee, neither transgressed I at any time thy commandment: and yet thou never gavest me a kid, that I might make merry with my friends:
- 30 But as soon as this thy son was come, which hath devoured thy living with harlots, thou hast killed for him the fatted calf.'
- 31 And he said unto him, 'Son, thou art ever with me, and all that I have is thine.
- 32 It was meet that we should make merry, and be glad: for this thy brother was dead, and is alive again; and was lost, and is found.'

¹ This essay was originally written as a contribution to a festschrift for one of the great story tellers of the common law, Brian Simpson (O'Donovan and Rubin (eds.) (2000), ch. 6). It is reproduced here by permission of Oxford University Press. One of his most original contributions to legal scholarship has been a new genre of contextual studies of leading cases (Simpson (1984b, 1994, 1995)). Simpson's essay on *Rylands v Fletcher* (1975, 1995) shows that modern perceptions of it as the leading case on strict liability in torts is different from perceptions at the time which took it to be a partial response to

the immediate problem of bursting reservoirs. It is also a vivid example of the process by which a decision originating in response to one situation can have little impact on the original problem, but may survive as part of the armoury of the common law, or of its mythology, in quite different social contexts. Like his other studies, it illustrates what the law reports do not tell us. Simpson's studies are interesting, amusing, and often surprising; but they are centrifugal rather than centripetal; and people sometimes ask: What lessons or morals can be drawn from Brian's accounts of *Rylands v Fletcher*, *R v Dudley and Stephens*, or *Liversidge v Anderson*? What exactly does the wonderfully entertaining *Cannibalism and the Common Law* illuminate? (Twining (1986d)). It tells us about many things, but it does not have one *ratio decidendi*. What is the point? Part of the argument of this paper is that it is limiting to think of contextual studies of common law cases, or Biblical parables, or the contents of the law reports as being only or mainly like morality tales. 'What is *the* point?' may not be the best question to ask.

- 2 Belloc (1939/1997), 76.
- 3 See above ch. 7.
- 4 'The Prodigal Son . . . Continues to produce more secondary literature than any other parable': Blomberg (1994), at 250.
- 5 The case is reproduced in *Analysis* (2005), ch. 12. This is a hypothetical case that originated as a simulated problem in the American National Trial Competition in the 1980s. It is particularly well-designed in that the documentation is thorough, and the evidence is difficult to analyse, is evenly balanced and raises interesting problems of trial tactics and presentation.
- 6 In this context 'theory' means a strategic argument concerning the case as a whole and 'theme' is an element in the argument that is considered sufficiently important to deserve emphasis by repetition. On the relations between theory, theme, and story see above 289–94 and *Analysis* (2005), 118–20, 153–8.
- 7 See Appendix.
- 8 Subsequently, students alerted to these points have usually shied away from using both the Prodigal Son and *Martin Chuzzlewit* as the explicit basis for themes in presenting their arguments.
- 9 I have relied heavily in this section on Blomberg (1994), whose survey concentrates on the period 1980–94. See also Otto Via (1967); Kallas (1992); Jeremias (1966); Linneman (1964).
- 10 A useful survey is Thistleton (1997/8).
- 11 Paraphrased from the *Oxford English Dictionary*.
- 12 Here the important point is that both the New Testament and the law reports are in (relatively) fixed verbal form (though translations differ), but interpretations of parables and cases are not. On the distinction between rules in fixed verbal form (such as statutes) and rules not in fixed verbal form (such as customary or common law rules) see (*HTDTWR*) at 131–2, 137, 218–19.
- 13 On the differences between authenticity, veracity, accuracy, and reliability see Schum (1994), *Analysis* (2005), ch. 2.
- 14 C. H. Dodd (1932), quoted by Donahue (1988).
- 15 Several of these, and possible differences between them, are discussed by Blomberg (1994).

- 16 Blomberg (1994) at 237–40.
- 17 Adapted from Dowling, Patterson, and Powell (1952), 34–5.
- 18 Based on Donahue (1988), 6.
- 19 Donahue (1988).
- 20 Simpson (1961), 159, 168. Simpson restricts the concept of *ratio* to binding precedents. This stems from the idea that it is the binding part of a binding precedent. This is a legitimate use, but not the only possible one. The idea of the *ratio* as the proposition of law (principle, rule, or rule-fragment) for which the case can be treated as authority, whether binding or persuasive, has two advantages: it (i) separates the puzzling idea of ‘bindingness’ from other problems of interpreting cases. The meaning of a precedent and its status as precedent can usually be treated as separate issues; (ii) allows for the possibility that the same or closely related methods of interpretation apply both to cases that are binding on the interpreter and to those that are not. Consider the interpretation of Case A, a decision of the Court of Appeal, at a particular moment of time by both the House of Lords and a lower court. The latter is bound, but the former is not; yet the proposition for which it is authority will usually be the same. See, however, some more subtle variants in the standpoints of the House of Lords and lower courts in regard to the Court of Appeal’s decision in *Davis v Johnson* [1979] AC 272, discussed in *HTDTWR* at 266–8. On the difference between Simpson and myself on the issue whether a ratio can change over time, see below, n. 25.
- 21 Adapted from *HTDTWR* (1999), at 334, where the definitional question is discussed in more detail.
- 22 For references, see *ibid*.
- 23 Twining (1988d), 456–71 (arguing that the terms *ratio decidendi* and *obiter dictum* obfuscate what is involved in using and interpreting precedents). Cross (1968) at 77–8 arrived at a similar conclusion by a different route.
- 24 Twining (1988d). Of course, the reasoning of a judge in a prior case cannot only be cited as authority but can also be used as raw material for constructing an argument. In this context citing a passage from a judgment often involves two implicit claims: ‘This is a strong argument and look who said it.’
- 25 MacCormick (1987) at 155 refers to the fifth (imputation) definition as *ratio-scepticism*. He implies that adopting such a usage involves radical indeterminacy or other versions of ‘free interpretation’. This is incorrect. Subsequent interpreters often give weight to the text as well as to other factors and such other factors may limit rather than extend the leeways for interpretation, e.g. there is much less scope for differing interpretations of the *ratio decidendi* of *Donoghue v Stevenson* in 1999 than there was in 1933 just because other contextual factors, especially later decisions, have narrowed the range of plausible interpretations. We now know that ‘the neighbour principle’ is too broad and that the duty of care in negligence is not confined to manufacturers of goods. MacCormick’s own account is more concerned with justification than with later interpretation and use. Simpson (1961) attacks as ‘perverse’ ‘the theory that the *ratio decidendi* of a case is a rule which is constructed by a later court when called on to consider the case’ (at 168). This is not the same as definition 5, which relates to the standpoint of an interpreter rather than to someone commenting on another court’s interpretation. There is nothing

perverse or odd about interpreter D saying: ‘Case A has been interpreted differently in cases B and C.’ D may prefer one of the two interpretations or construct another; D may argue that each interpretation was plausible at the time, but neither is plausible today, and so on.

26 *HTDTWR* (1999) at 336–7.

27 *Ibid.*, ch. 6.

28 Jeremias (1966) concludes, ‘The parables have a twofold historical setting. First, the original historical setting, not only of the parables, but of all Jesus’ sayings, is their individual concrete situation in his earthly life. Secondly, they went on to live in the primitive Church. We know them only in the form that they were received from the primitive Church, and so we are faced with the task of recovering their original form as far as we can’ (at 87). Jeremias suggests that the meaning may have changed because of the evangelizing concerns of ‘the primitive Church’ and its propensity to add generalizing conclusions. On the tendency of earlier commentators, such as Julicher and Jeremias, to lose interest in the story once they have extracted the point, see Bankowski (1998), 138; see also Bankowski and Davis (1999).

29 Blomberg (1994) 237–40.

30 Adapted from *The Random House Dictionary of the English Language* (unabridged edition, 1966). The *Oxford English Dictionary* devotes over ten pages to ‘point’, cataloguing many nuances and analogies; the closest to the idea in the present context is: ‘28 . . . The precise matter in discussion to be discussed; the essential or important thing.’ Cf. ‘29b. *to make a point*: to establish a proposition, to prove a contention.’

31 Linneman (1964), at 23.

32 Kallas (1992), at 79–80.

33 Blomberg (1994), at 232–3.

34 *Ibid.*, at 237–9.

35 Above, n. 12.

36 Dworkin (1986), ch. 2, discussed *HTDTWR* at 377–9. Dworkin’s notion of ‘integrity’ transfers quite easily from legal to theological interpretation; the idea of precedents being like chapters in a chain novel is less obviously analogous.

37 Twining (2001) 119–37.

38 For such purposes, Dworkin’s concept of interpretation may be appropriate for most official participants, even if we do not accept, fully or in part, his particular theory of legal interpretation and argumentation. However, as argued elsewhere, it is useful to distinguish puzzlement about role from other puzzlements about interpretation of texts. *HTDTWR* at 335–57. Thus it is easier to identify what is involved in interpretation of a precedent from the standpoint of an advocate (relevant precedents are either adverse or supportive of an argument), than from the standpoint of a judge, just because ‘the role of the judge’ is more problematic.

39 Doubts about the most appropriate level of generality of a precedent are not the only ones, but they are the most common. For example, doubts can arise about the precedent value of a case (is it strongly or weakly persuasive?; Has it been overruled or narrowed down?); and about the appropriateness of the classifying concepts used to categorize the situation (e.g. at various times there have been differences of view as to whether the

- facts of *Donoghue v Stevenson* raised issues of privity or duty of care in negligence or product liability, concepts which do not differ solely in respect of levels of generality).
- 40 'If X' is the protasis, 'then Y' the apodosis of a rule of law. Y typically relates to liability or responsibility (guilty/not guilty; liable/not liable).
- 41 See Yalden-Thomson, discussing, in 1974, John Wisdom's lectures on 'Proof and Explanation' (delivered in 1957). See now, for fully published version, Yalden Thomson (1991).
- 42 See above, nn. 31–4.
- 43 *HTDTWR*, ch. 6.
- 44 Above, 400.
- 45 Above, 401.
- 46 I skirt over the issue of whether all those who read and use law reports, especially non-participants who consider them from an external point of view, can be said to belong to one interpretive community.
- 47 Katherine O'Donovan rightly points out that in some specialist series of law reports, as in family and medical law, cases may be selected other than for their value as precedents and that the proliferation of reported cases may be attributable to commercial reasons that do not restrict selection to cases of 'precedent value'. My remarks here therefore refer to paradigm examples of general, selective law reports for which the criteria of inclusion have traditionally been mainly related to their value as precedents.
- 48 Above 405. Of course, there may be doubts about the scope or level of generality of 'the moral' of a morality tale (see below), but this is not the main source of doubt in respect of parables.
- 49 *R v Bow Street Metropolitan Stipendiary Magistrate, exp Pinochet Ugarte (Amnesty International intervening)* (No. 3) [1999] 2 All ER 97.
- 50 Thisleton (1997/8).
- 51 Otto Via (1967), at 169–70 (citing Linneman).
- 52 Linneman (1964), at 74–6.
- 53 In contrast, contextual histories of leading cases in the genre originated by Simpson (see note * above) tend to illustrate how far later interpretations may stray from the original context, which may not limit or even affect the scope for interpretation.
- 54 Kallas (1992).
- 55 Cf. the use of such limiters in leading cases: 'the neighbour principle' in *Donoghue v Stevenson* [1932] AC 562 presented as setting limits to the scope of the duty of care; similarly, in *Candler v Crane Christmas* [1951] 2 KB 164, Denning MR (dissenting) was careful to emphasize proximity, the expert–non-expert relation, and reliance as *potential limiters* as he tried to extend the scope of the duty of care to negligent misstatements involving financial loss. See above 300–3. The classic formulation of the rule in *Rylands v Fletcher* also contains such limiters.
- 56 *HTDTWR* at 207–8.
- 57 *Ibid.*, chs. 6 and 9.
- 58 For useful surveys of the range of perspectives see Blomberg (1994) and Thistleton (1997–8).

Taking Facts Seriously – Again*

Introduction

In 1980 I delivered a paper called ‘Taking Facts Seriously’ which is quite well known but has made almost no impact.¹ I think that the argument is both correct and important for our ideas and practice in academic law in respect of legal method, legal theory, the law of evidence, and legal education generally. Its fate reminds me of a dictum of Karl Llewellyn: ‘When Cicero made a speech, you said: “No mortal man is so eloquent”; when Demosthenes made a speech, you yelled: “WAR!!”.’ It seems to have been a failure of advocacy.

The occasion for the original talk was the opening of a new law school building in Victoria, British Columbia; the context was a symposium on legal education; the audience consisted mainly of judges, senior practitioners, academic lawyers, and law students. There were probably no more than four or five specialists on evidence present. My thesis was that the subject of evidence, proof and fact-finding (EPF) deserves a more salient place in the discipline of law. The gist of the argument was that fact investigation, fact management, and argumentation about disputed questions of fact in legal contexts (not just in court) are as worthy of attention and as intellectually demanding as issues of interpretation and reasoning about questions of law. It was an argument about the importance of the study of facts in legal education and it was addressed to a general legal audience.

When the paper was published it was received politely, but failed to persuade, perhaps because it fell between audiences: practitioners quite liked it, but it was about legal education; many academic lawyers perceived it as addressed to specialists in evidence and so of no concern of theirs; some evidence teachers perceived it as a radical and undiplomatic critique of traditional courses on the law of evidence; others saw it as poor salesmanship for improbable Wigmore charts.

Here the intended audience is both specialists in evidence and academic lawyers generally. My aim is threefold: first, to restate the original thesis and to argue that it deserves support, not mainly or solely to mitigate curricular pressures, but rather because many of the issues are important to understanding and practicing law. Secondly, to consider how a coherent single introductory course on evidence can be constructed in conditions of curriculum overload and neglect of evidentiary issues

in other parts of the curriculum.² Thirdly, to suggest some ways in which the recent emergence of evidence as a multidisciplinary field in its own right might affect the study and teaching of evidence in law.

The subject of evidence deserves a more central place in the discipline of law

Rather than go over the ground covered by the earlier paper, let me briefly restate the reasons why our subject is important. The argument in outline falls under five main heads:

- 1 Understanding evidence is an important part of understanding law.
 - (a) EPF is important for legal theory because it raises a whole range of theoretical issues that generally are not included in the agenda of mainstream jurisprudence.
 - (b) EPF should play an important role in the study of many specialized areas of law.
- 2 EPF is important in legal practice.
- 3 EPF is a good vehicle for developing some basic transferable intellectual skills.
- 4 As the discipline of law becomes more cosmopolitan, interesting new issues of comparison, generalization, and hybridization are raised in respect of EPF.
- 5 The subject of evidence is coming into its own as a distinct multi-disciplinary field.

Understanding evidence is an important part of understanding law

(a) *Evidence is important for legal theory* because it raises a range of theoretical issues that generally are not included in the agenda of most legal theorists: the practice of treating ‘legal reasoning’ as being solely concerned with, typically hard, questions of law is merely symptomatic of more fundamental distortions in the agendas of jurisprudence, as I have argued about at length elsewhere.³

It is odd that issues of fact determination rarely play a significant part in theories of adjudication.⁴ How can one have a coherent and comprehensive theory of judging that ignores decisions on questions of fact, procedure and disposition? How can the separation of two bodies of literature be justified on the fragile basis of the notoriously problematic distinction between questions of fact and questions of law?⁵ It is strange that basic concepts in the subject of evidence, such as relevance, materiality, probative force, probability, credibility, and presumptions have received little sustained attention from analytical jurisprudence.⁶

It is odd that nearly all discussions of legal reasoning and interpretation concentrate on reasoning and interpretation about questions of law, with little or no reference not only to reasoning about questions of fact, but more generally to reasoning and rationality in other legal contexts such as investigation, negotiation, and sanctioning. Nor are the relations between these various kinds of lawyers’ reasonings adequately explored.

It is odd that issues about the relationship between narrative and argument, between ‘holism’ and ‘atomism’, and questions of coherence should not be perceived to be central to theories of legal reasoning and rationality.⁷ The role of

narrative in legal discourse and questions about the relations between narrative, reasoning, argumentation and persuasion are distorted if narrative and stories are only considered in relation to disputed questions of fact in adjudication.⁸ Stories and story-telling are also important in investigation, mediation, negotiation, appellate advocacy, sentencing, and predictions of dangerousness, for example.⁹ A general theory of narrative in law and legal argumentation needs to encompass all such questions. Some of these topics have been canvassed rather eclectically under the heading of 'law and literature',¹⁰ but a comprehensive framework has yet to be developed within which all these lines of enquiry can be considered in relation to each other.

Jurisprudence needs to take issues relating to evidence more seriously within a balanced conception of what is involved in understanding law.¹¹ Neglect of those issues results in a distorted picture of adjudication, litigation, legal reasoning, and legal practice.

(b) *Evidence should play an important role in the study of many specialized areas of law.* Questions of fact and other evidentiary issues arise in every field of law. Discrimination, land disputes, and rape¹² are standard examples. This point is widely recognized, but unevenly acted on. There are also familiar problems of overlap between courses on evidence and procedure, legal institutions (for example, the jury, the police) and legal processes; there is a developing literature on problems of proof in international criminal tribunals (not only about rules of evidence, but whether crimes against humanity raise any special issues about proof).¹³ Some of these matters relate to general questions about the extent to which principles of proof are context-independent and substance-blind.¹⁴ Such issues arise not only in legal contexts, but more generally and acutely in considering evidence from multidisciplinary perspectives.¹⁵

Evidence is important in legal practice

When Jerome Frank argued that over ninety per cent of adjudication and pre-trial work is more concerned with doubts and uncertainties about facts than with interpretation and argument about questions of law he partly understated the case, because he was only concerned with litigation and his main focus was on the contested jury trial.¹⁶ But the general message is basically correct – that inferential reasoning and other aspects of information processing are important in most contexts of legal practice and have been relatively neglected in legal education and training. The emphasis on the Federal Rules in American bar examinations and on the rules of evidence in police training to the neglect of inferential reasoning are prime examples.¹⁷

EPF is a good vehicle for developing some basic transferable intellectual skills

Skill in inferential reasoning is as much a part of 'legal method' as questions of law and as demanding.¹⁸ Within EPF, the main ingredients are: (a) managing complex data and constructing and criticizing complex arguments, including such

techniques for marshalling evidence as chronological tables, classifying evidence by source, Wigmore charts, and stories;¹⁹ (b) skills of inferential reasoning and microscopic analysis; (c) some basic numeracy skills;²⁰ (d) constructing, communicating, and countering persuasive stories; and (e) ethical questions relating to all of these. Some of us seek to develop such skills within courses on evidence.²¹ This can work quite well, but involves two costs: first, some of these topics are important in other contexts. Isolating them in contexts where the focus is on fact-management artificially separates them both theoretically and practically from other relevant contexts. For example, numeracy skills apply to more than probabilities and proof.²² Secondly, if some of these matters are not dealt with elsewhere it puts a very heavy pressure on courses on evidence.

As the discipline of law becomes more cosmopolitan interesting issues of comparison, generalization, and hybridization are raised in respect of EPF

In recent years increasing attention has been given to comparative procedure and evidence and to the implications of globalization for the study of law. For example, Damaska's pioneering work has provided a framework for comparing not only procedural systems, but also how evidentiary issues are treated within such systems.²³ Crombag, von Koppen and Wagenaar applied ideas and hypotheses developed by psychologists and others in the United States to cases in the Netherlands.²⁴ This work raises some important questions about the extent to which logical principles, evidentiary concepts, empirical findings, and particular doctrines 'travel well' across legal traditions and cultures.²⁵ I am told by civil lawyers that the ideal types of 'The Rationalist Tradition' seem to fit civilian systems better than common law ones.²⁶ Truth and Reconciliation commissions, international criminal tribunals, and international commercial arbitration all raise interesting issues about evidence and proof in these special contexts.²⁷ And, of course, the European Convention on Human Rights has had both a direct and an indirect influence on the law of evidence in the United Kingdom.²⁸

The subject of evidence is coming into its own as a distinct multi-disciplinary field

This is perhaps the most interesting development in recent years and will be discussed below.

For all of these reasons EPF deserves a more central place in the culture of our discipline.

Teaching evidence at first degree level: a suggested framework²⁹

The thesis that EPF deserves a more central place within the discipline of law implies that the subject deserves more space within undergraduate and post-graduate degree programmes. Either more attention should be given to evidentiary issues under the rubrics of legal method, jurisprudence, legal system, comparative law, and the like,

or there should be room for at least two courses in the general area. However, until that thesis gains acceptance, we have to confront the problems of designing coherent single courses on evidence in a context of curriculum overload.

In an interesting lecture entitled 'Rethinking the Law of Evidence',³⁰ Paul Roberts purported to support my main arguments about taking facts seriously, while criticizing my advocacy. He focused on teaching courses on evidence at undergraduate level, which is the most problematic in terms of overload. While careful to reassert his commitment to pluralism in undergraduate legal education, Roberts has constructed a model for an undergraduate course on evidence that can be contrasted with more narrowly focused courses on the law of evidence. This is now implemented and made concrete by Roberts and Zuckerman's stimulating book *Criminal Evidence*.³¹

Roberts sets out a foundational principle for evidence teaching based on an orthodox view of the first law degree as the final formal stage of a liberal education.³² It can contribute to this enterprise by 'inculcating relevant, robust, and adaptable (more or less) transferable skills, helping students to become life-long learners, and promoting responsible citizenship'.³³

Let us accept this as a recognizable starting-point for constructing a course on Evidence as part of a liberal undergraduate law degree and sidestep arguments about the aims of legal education.³⁴ As I interpret Roberts's conception, we may differ on a few points (mainly of emphasis and priorities), but we agree on the basics. On this interpretation, the building blocks for Roberts's conception of a basic evidence course (assuming a degree programme that does not deal with evidentiary issues in a sustained way elsewhere) are as follows:³⁵

- 1 The study of the law of evidence should be situated in its procedural, institutional, and theoretical contexts.³⁶
- 2 The study of evidence should encompass all stages of legal process and should not be confined to contested trials, let alone jury trials. In particular, there is a greater need than in the past for focus on pre-trial process (including fact-investigation). In short, the procedural context involves a total process model of litigation.
- 3 The theoretical context includes questions about epistemology, inferential reasoning, and principles of political morality (including feminism,³⁷ economic analysis,³⁸ critical theory³⁹ and post-modernism⁴⁰).
- 4 The connections between fact-analysis and the rules of evidence need to be made clear and treated as part of a coherent whole.⁴¹
- 5 The topic of relevance is the main bridge between fact analysis and legal doctrine:
 - (a) Relevance is the most important mechanism of exclusion.
 - (b) To understand relevance involves understanding the principles and characteristics of inferential reasoning.
 - (c) The principles of proof are anterior to the other exclusionary rules because the latter deal with the exclusion of relevant evidence.
 - (d) The law of evidence can be treated as a coherent whole by Thayer's inclusionary and exclusionary principles, which are both expressed in terms of relevance within a basic framework of argumentation.⁴²

- 6 The logic of proof is an important element in studying, for example, basic concepts of the law of evidence, hearsay, scientific evidence, judicial notice, similar facts, prejudicial effect/probative value, burdens and standards of proof (and standards for other decisions),⁴³ and presumptions.⁴⁴
- 7 The increasingly important subject of scientific and expert evidence is a good peg on which to hang some of the central epistemological questions concerning evidence.⁴⁵
- 8 Evidentiary issues arise in all types of proceeding, in all types of legal processes and at every stage. However, the subject becomes more manageable and coherent if one focuses on one type of proceeding – in particular, criminal process, which has in practice become the main focus of attention in evidence courses in England and, to a lesser extent in the United States.⁴⁶
- 9 Despite (8), basic principles of reasoning and analysis about questions of fact and basic concepts, such as relevance, credibility, and probative force, are both substance-blind (Schum) and context-blind, in that they transcend not only the criminal/civil divide, but also travel well across Western legal traditions and even disciplinary boundaries.⁴⁷
- 10 As the discipline of law becomes more cosmopolitan, more attention will inevitably have to be paid to the European, international, transnational, and comparative aspects of evidence.
- 11 Given time, a course on evidence can be one vehicle for the development of law-related numeracy skills.
- 12 Evidence-based narrative plays a central role in constructing and presenting arguments about questions of fact.⁴⁸

Roberts and I seem to be in broad agreement about these twelve propositions. However, developing some general points may bring out some differences, at least of emphasis and priorities.

Evidence theory is important in providing a coherent framework for the study of evidence in law (EPF)

Wigmore divided the subject of Evidence in law into two complementary parts: ‘The Principles of Proof’ (‘as given by logic, psychology, and general experience’) and ‘the Trial Rules’. He argued that the Principles of Proof are anterior to the Trial Rules, are more important in practice, and had been neglected by scholars and teachers of evidence. This neglect continued until the rise of ‘the New Evidence Scholarship’ in the 1970s and 1980s, which to date seems not to have been matched by a comparable development of ‘New Evidence Teaching’. One reason for this is the lack of a coherent framework.

If we accept that evidence is best studied in the context of a total process model of litigation (civil, criminal, and other), then Wigmore’s focus on contested jury trials and his concept of ‘Trial Rules’ are too narrow. However, his conception of the subject of evidence in law as consisting of two closely related parts has much to commend it. I prefer to refer to these parts as the principles of proof (or the logic of proof) and the law of evidence, rather than subsuming both under an expanded conception of the law of evidence. But that is mainly a matter of labelling.⁴⁹

To construct a coherent framework for the study of evidence in law requires two further steps: a coherent picture of each of the two component parts and a coherent conception of the relationship between the two parts.

I suggest that the model of ‘The Rationalist Tradition of Evidence Scholarship’ provides the most coherent view of the principles of proof. This can be encapsulated in the Benthamite proposition that the direct end of legal procedure is the pursuit of justice under the law through achieving rectitude of decision by rational means.⁵⁰ One does not have to subscribe to all of the elements in this ideal type to use it as an organizing device; indeed, my particular formulation of ‘the Rationalist model’ was specifically designed to signal potential significant points at which it might be challenged by various kinds of sceptics and others. Rather the model is robust for two reasons: first, because it represents a stable set of assumptions that have generally been shared by leading writers on the law of evidence in the common law tradition for over two centuries. These assumptions also underpin important attempts to rationalize the law of evidence, including the American Federal Rules. Secondly, the ideal type sets the study of evidence at the outset in its ideological context, that is to say the underlying values involved in the design and operation of legal procedures. Since the main values involved – truth, reason, justice, and the public interest – are regularly, perhaps essentially, contested, far from being a naive, dogmatic, functionalist model, it provides a context for considering controversial issues.

Historically, most of the controversies in Anglo–American evidence scholarship can be accommodated within the Rationalist model, because they either relate to priorities between truth and other values or represent different views of rationality (for example, Baconians versus Pascalians) or different epistemological theories (for example, correspondence versus coherence theories of truth) or between political priorities (for example, process values/due process versus social control). These can be seen as debates within the Rationalist Tradition. However, as mentioned above, the model is set up to identify a range of potential points of departure from one or more of the assumptions of that tradition, for example, challenges from strong philosophical sceptics, cultural relativists, post-modernists, or those who doubt the desirability, or the feasibility, or the sense in expecting litigation to be centrally concerned with truth, justice, or reason.⁵¹

The Rationalist model provides a starting-point for considering the subject of evidence in law (EPF) as a coherent whole, including giving a context to the logic of proof, which in our tradition has its roots in the empiricist tradition of Bacon, Bentham, J. S. Mill, Jevons and Sidgwick, since carried on by Jonathan Cohen, Stephen Toulmin, Douglas Walton, and David Schum.

What of the law of evidence? Can it be given a coherent framework so that it is not just seen as a rather fragmented confusing collection of loosely related topics? In England some advance has been made by the admirable efforts of Ian Dennis, Adrian Zuckerman, Andrew Ashworth, and others to expound the law on the basis of underlying principles,⁵² but I still come across students in both London and the United States whose impression is that the subject consists of a rather arbitrary

collection of technical rules. This seems to happen quite often even with those who have studied the Federal Rules, which has a discernible framework; still more so with students who have been exposed to the seeming jumble of piecemeal legislation and case law that we have in England. The reason for this sad state of affairs seems to me to be that they have not been presented with a coherent overview and that generally they have been short-changed on the topic of relevance.⁵³ Maybe this is because relevance is not a matter of law and to understand relevance one has to understand the logic involved. As Thayer put it, ‘the law has no mandamus on the logical faculty’.⁵⁴

There are, no doubt, several ways of presenting the rules of evidence within a coherent framework. My view, which is quite orthodox, is that our law of evidence is based on the Thayerite theory that the rules of evidence are a series of disparate exceptions to a principle of free proof, where free proof means ordinary principles of practical inferential reasoning.⁵⁵ One needs to understand the principle before studying the exceptions. That means understanding the logic of proof. Thayer may have exaggerated the importance of the jury in the historical development of the law of evidence; he may have taken an unnecessarily narrow view of the law of evidence by equating it with exclusionary rules in disputed trials (but he did write about presumptions, burdens of proof, and judicial notice); but he was surely right in maintaining that the rules of evidence need to be conceived within a framework of *argumentation*.

From the point of view of pedagogy, the topic of relevance is the obvious bridge between the logic of proof and the rules of evidence.⁵⁶ Understanding relevance involves understanding the logic of proof within a framework that treats both the principles of proof and the rules of evidence as belonging to a single, coherent subject. I completely agree with Paul Roberts that the topic of relevance should not be seen as something merely to be introduced in the first week and then ticked off.⁵⁷ Rather it should be a constant theme in studying all other topics in the law of evidence. However, in the next section I go further and argue that understanding the logic of proof involves skills as well as knowledge. Studying it directly for a substantial period at the start of a course and reinforcing it throughout is a more economical and effective way of understanding evidence. Further, it develops some valuable general intellectual skills.

Studying about and learning how

A clear distinction needs to be drawn between learning about reasoning and learning how to reason. Basic skills of inferential reasoning about questions of fact need to be as much a part of ‘legal method’ or ‘thinking like a lawyer’ as basic skills of constructing and criticizing arguments about questions of law.

It is one thing to describe, interpret, and analyse the reasoning of judges or counsel; it is quite another to master the skills involved in constructing valid, cogent, and appropriate arguments on questions of law. It is one thing to describe Hercules;

it is another to emulate him. Most teaching and literature on ‘legal reasoning’ talks about it. In some books and courses on ‘legal method’, the distinction is blurred.⁵⁸ Similar considerations apply to reasoning about questions of fact. Roberts and Zuckerman’s *Criminal Evidence* is the latest in a succession of evidence texts that have moved in the direction of explicitly recognizing that the logic of proof (or fact analysis) is an integral part of understanding the subject of evidence in law. But few of them move beyond giving an account of the kinds of reasoning involved. For example, Roberts and Zuckerman under the heading of ‘taking facts seriously’ devote over twenty pages to introducing basic concepts of inferential reasoning, probabilities, and debates about Bayes’ Theorem in legal contexts. It is one thing to consider such debates; it is another to learn how to manipulate the theorem.⁵⁹ This section of the book clearly falls within the category of studying about rather than learning how. Given the textbook format, this is understandable and some evidence teachers may consider it to be a sufficient advance. But the question arises: is it desirable and feasible to go beyond this, to try to help students to master the basic reasoning skills involved?

Paul Roberts explicitly acknowledges that a course on evidence is a good vehicle for ‘inculcating relevant, robust and adaptable (more or less transferable) skills’.⁶⁰ I would be more emphatic than Roberts for two reasons: first, mastery of basic skills of inferential reasoning (and, only slightly less so, some basic numeracy skills) is one of the most valuable things that a good liberal education in law can offer. In my view, such mastery is best achieved by direct study rather than osmosis.⁶¹ Secondly, if the principles of proof, that is, ordinary practical inferential reasoning, underpin the law of evidence, experience suggests that this is an area where learning how is the quickest and fastest route to understanding.

If inculcating basic skills of inferential reasoning is desirable, how is this best done and how much time is needed? What Wigmore called ‘the logic of proof’ involves applying general principles of inferential logic in legal contexts. One possibility might be to require students to take a course on logic either as part of their degree or in a pre-law programme (which is a more likely option in the United States). Another possibility might be to use a standard book on logic or critical thinking, supplemented by a few legal examples. Unfortunately, this does not work very well for two reasons: first, most courses and texts on logic deal with formal logic, with an emphasis on deduction, whereas inferential reasoning in law is generally recognized to be mainly informal;⁶² secondly, and probably more important, is the point that one of the most important skills in law relates to structuring complex arguments – what is variously referred to as fact management or evidence marshalling. Most general books and courses on logic focus on quite limited examples involving only a few propositions; when non-lawyers discuss legal examples they tend to present an over-simple picture of what is involved in an argument about a case as a whole, even in quite straightforward cases.⁶³

And so back to Wigmore.

The chart method and alternatives

Roberts states: ‘one does not have to be a Wigmorean chart methodist to take facts seriously’.⁶⁴ That is, no doubt, true, but if ‘taking facts seriously’ in teaching includes inculcating skills of fact analysis, as Roberts claims, then one needs to be clear about the options. Roberts mentions, as alternative approaches to fact-analysis, narrative and story-telling and Bayesian theory. He considers these to be complementary rather than rival approaches.⁶⁵ But the literature he cites consists of discussions *about* these methods, rather than vehicles for developing the particular skills involved in constructing arguments about questions of fact. Other alternatives can be found, for example, in the work of the Amsterdam School of Argumentation⁶⁶ or some developments of computer applications, for example by Henry Prakken.⁶⁷ However, in my view, these approaches tend to over-simplify the nature of argumentation in legal contexts. In any case, they are quite similar in conception to Wigmore’s approach.⁶⁸

As Roberts recognizes, the chart method is only one of several ways of organizing data for the purposes of constructing an argument. Chronologies, stories and the outline method (organizing evidence by source as is done in some American trial books) are other standard methods.⁶⁹ However, none of these organizes the material in the form of a structured *argument*; typically each is a useful preliminary to constructing an argument, whereas the chart method represents the argument itself. And, if one follows Thayer, argumentation is the context in which the rules of evidence are best understood and used.

The most common complaint about the chart method is that it is too time-consuming and too laborious to be fitted into a standard course on evidence or to be of practical value. This argument has some force, but it needs to be considered in the light of two distinctions.

First, the distinction between mastering a skill and applying it in practice: learning to master the chart method thoroughly is difficult and time-consuming. But that is true of any other important intellectual skills that may be developed in formal legal education. One can introduce the basics quite quickly, but real skill can only be developed if it is reinforced by repeated exercises and experience. Mastery of a skill includes an understanding of its uses and limitations. Once a skill is mastered, one is in a position to make sensitive judgements as to when to use it informally and when to apply it in its full rigour. Once one has mastered the basic skills, the method inculcates disciplined habits of mind that can be exercised routinely in an informal way. Used thus, it becomes more efficient and economical than other methods, especially in complex cases.

The chart method has two main aspects, macroscopic analysis of the case as a whole and microscopic analysis of selected phases of the argument in the case. First, the method is an extremely useful technique for managing facts, marshalling evidence, and structuring arguments in complex cases. Structure is achieved by working backwards from the ultimate conclusion (the top of the chart) and organizing

different phases of the argument into discrete, manageable sectors. The key lies in anchoring the arguments about the case as a whole in a defined standpoint, clear questions, and precisely formulated hypotheses or conclusions. Plotting the basic structure of an argument is a simplifying device. Even in very complex cases, it is typically not time-consuming, but rather the reverse: it saves time.⁷⁰

The second aspect involves precise and detailed analysis of important phases of the argument. This 'microscopic analysis' is often perceived to be extremely arduous and time-consuming. However, the skilful analyst learns some basic principles of economy, by identifying crucial or important phases within an argument and focusing mainly on these. In advocacy 'going for the jugular' means concentrating one's attack on the weakest point in an opponent's argument or, more positively, building up support for a proposition, which, if established, will ensure success. The chart method of analysis is particularly useful in identifying key propositions in an argument or, in investigation, in guiding enquiry by identifying potentially important propositions that are needed. The standard objection of practitioners is that the pure Wigmorean method is too cumbersome and too time-consuming to be a practical tool for trial preparation.⁷¹ But that refers to attempts to do a complete chart of a whole case. Nearly always, microscopic analysis can be confined to a few key phases in an argument.

Structuring an argument need not be time-consuming; precise microscopic analysis can be selective; but mastering the skills takes time. The problem of how to combine fact analysis and the law of evidence in a single coherent whole remains. Clearly there are questions of priorities, but the problem is soluble. The solution that has worked best in my view has been that adopted at the University of Miami Law School: to make Analysis of Evidence a self-standing first year option (two credits). A second possibility is to integrate fact analysis with legal analysis in a skills-oriented legal method course. That integration lays a foundation that can be reinforced later. If neither of these are viable options, then the principles of proof and the rules of evidence have to be fitted into a single course, with proof/fact analysis taking the place of relevance as the first topic, but with a bit more time allotted to it. Terry Anderson has done this with a four credit standard Evidence course at Miami, and I have done this in a quite different way in the first six weeks of the year-long course on Evidence and Proof in the London LLM.⁷² While some topics in the law of evidence may be squeezed, the approach is economical because (1) the basic concepts of the logic of proof and the rules of evidence are largely shared; (2) thinking about evidence in terms of inferential reasoning and argumentation lays a foundation for the Thayerite view of the law of evidence as a coherent whole; (3) after the basic skills have been introduced they can be reinforced throughout the course, if relevance and fact analysis are treated as part of most particular topics in the law of evidence; and (4) once over an initial hump, most students find this approach both interesting and realistic.

This approach is efficient because, as the students learn the basics of the chart method, they begin to grasp a lot else besides. In five to six weeks I aim to have

introduced (a) the basic concepts of the law of evidence as well as of the logic of proof; (b) the underlying theory of the chart method (including comparison with chronological tables, stories, and the outline method); (c) a detailed application of each element of the seven step protocol to a complex *cause célèbre*; and (d) the Thayerite conception and overview of the rules of evidence⁷³ and the relationship between the principles of proof and the rules of admissibility.⁷⁴

To sum up: understanding the logic of proof is a pre-condition to understanding the subject of evidence in law; understanding logic is best developed by a combination of theory and practice; *mastering* the methods of analysis involved in the chart method is laborious and time-consuming, learning the basics is less so. Despite its image, the chart method used intelligently and selectively is an efficient way of dealing with complex arguments about questions of fact and provides a foundation and a context for understanding and using the rules of evidence.

Evidence as an emerging multi-disciplinary field: some implications

Perhaps the most important development regarding evidence in the past ten years or so has been the emergence of evidence as a distinct multi-disciplinary field in its own right with a high public profile. A number of largely unrelated developments have contributed to this: DNA analysis and advances in forensic science, followed by the heightened profile of forensic scientists in fiction and television programmes. Tragic events in Eastern Europe, Rwanda, South Africa, and Latin America have stimulated an enormous interest in ‘memory’, not only because of Truth and Reconciliation Commissions and international criminal tribunals, but also in a range of academic disciplines.⁷⁵ The ‘narrative turn’ in several disciplines; the growth of evidence-based approaches to medicine, public policy and education; the search for ‘weapons of mass destruction’ in Iraq; the ‘dodgy dossiers’ and the Hutton and Butler enquiries were all centrally concerned with evidentiary issues.⁷⁶ Above all, the events of 11 September 2001 have posed fundamental challenges to the methods of intelligence services in marshalling, interpreting, and analysing information. There are many other examples.⁷⁷

During the same period developments in academic disciplines have paralleled or responded to these stimuli. Not surprisingly, there is a movement to draw all of these disparate elements together into a single, coherent multi-disciplinary field. Pre-eminent among these efforts has been the work of David Schum, whose *Evidential Foundations of Probabilistic Reasoning* is still the best place to begin.⁷⁸

Clearly law has something to contribute to and a lot to learn from these developments.⁷⁹ In the present context, the question arises: what might be their significance for courses on evidence in law schools? During the twentieth century evidence scholarship was open to a variety of influences from other disciplines – forensic science, forensic psychology, statistics, logic, narrative theory, artificial intelligence, complexity theory, and computer applications are familiar examples.⁸⁰ This well-established tradition of inter-disciplinary work has fed into teaching. The

development of a distinct *multi-disciplinary* field promises at the very least to raise some profound questions about the transferability of ideas about evidence across disciplines, cultures, and different practical contexts. It will also greatly broaden the range of cases, concrete examples, and issues that may be worthy of attention by lawyers.

It may be some time before the implications for teaching evidence in law schools become apparent. But evidence teachers would do well to watch this space. Already, by establishing links with other disciplines, the range of accessible ideas and concrete examples is becoming much richer. Of course, non-legal and quasi-legal examples have been used in evidence teaching in the past: the judgment of Solomon, the Rosetta Stone, famous historical puzzles and mysteries, and especially Sherlock Holmes, have featured in evidence courses and texts. The stock of examples that might be used in teaching is rapidly increasing. For example, in the aftermath of 9/11 David Schum has designed a series of scenarios for training intelligence analysts – some frighteningly realistic – that can be used in teaching law students about inferential reasoning and fact-management. Such non-legal examples in addition to being interesting in themselves, reinforce the message that the study of evidence in law is fundamentally and inescapably related to the study of evidence generally.

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1 Above ch. 2, originally published in Gold (ed.) (1982) and (1984) 34 *Jo Leg Ed* 22.

2 This essay is concerned with courses in primary legal education, whether undergraduate (as in the United Kingdom) or postgraduate (as in the United States and some other common law countries). The general argument applies to both but, as is indicated below, pressures on time and from professional examinations vary between jurisdictions.

3 Above, ch. 8 and *LIC*, ch. 6.

4 For example, the most prominent modern theory of adjudication, as developed by Ronald Dworkin in *Taking Rights Seriously* and *Law's Empire*, almost completely ignores such matters as fact-determination and sanctioning.

5 Cf. Ronald Allen and Michael J. Pardo (2003) and Kirgis (2004).

6 A classic exception is Montrose (1968). The case for a broadened conception of and agenda for analytical jurisprudence is developed in Twining (2005).

7 Neil MacCormick's essay 'Coherence in Legal Justification' (1984) has stimulated an extensive literature, but still mainly in relation to interpretation and application of legal rules. See now MacCormick (2005), chs. 10 and 11. See also Pardo (2000).

8 Above ch. 10.

9 Above ch. 10. See also David Schum *Foundations* (1994/2001), 195–9; Binder and Bergman (1984) (fact investigation); Llewellyn (1960) (appellate cases); Shapland, (1981) (pleas in mitigation); Becher-Monas (2003) (prediction of future dangerousness); *Analysis* (2005) adopts a total process model and emphasizes investigation

(ch. 2) and standards of evaluation of evidence for different kinds of decision (ch. 8).

- 10 E.g. Ledwon (2003).
- 11 E.g. Paul Roberts reports that ‘there is the suspicion that Twining, as a jurist, is intent on turning the Law of Evidence into a branch of Jurisprudence’. P. Roberts (2002), at 310. That is a misrepresentation. I might be an evidentiary imperialist, but my main point is that neglect of such issues within jurisprudence tends to promote a distorted understanding of law and legal phenomena. As relatively faithful disciples of Karl Llewellyn, both my co-author, Terry Anderson, and I reject sharp distinctions between ‘theory’ and ‘practice’, but as Roberts points out our teaching of ‘Analysis of Evidence’ claims to be far more directly practical than study of the formal law of evidence (ibid.).
- 12 For example, Ellison (1998), Kibble (2004).
- 13 See below n. 27.
- 14 See Schum in *Evidence and Inference* (2003), ch. 1 and below, ch. 15.
- 15 See below, at 428–9.
- 16 On Frank see above 116–19.
- 17 Leary (2004), ch. 1.
- 18 On the response to objections that ‘skills’ are illiberal, see *LIC*, ch. 9.
- 19 Different methods of marshalling evidence and structuring arguments are discussed at length in the second edition of *Analysis* (2005), chs. 4–6.
- 20 See *Analysis* (2005), Appendix I, Hawkins and Hawkins (1998), and Wagenaar and Crombag (2005).
- 21 If one believes that stories play an important role in fact-determination, but are also prime vehicles for ‘cheating’, then teaching skills of persuasive story-telling raises ethical issues, analogous to classic problems of teaching rhetoric.
- 22 See, for example, the range of topics covered in Finkelstein and Levin (2001); Gastwirth (2000); Dawid (2005a).
- 23 Damaska (1986); (1997).
- 24 Wagenaar, von Koppen, and Crombag (1993) (discussed *GJB*, ch. 13); cf. van Kampen (1998); Anderson (1999a), Malsch and Nijboer (1999).
- 25 On concepts ‘travelling well’, see Twining (2005).
- 26 See above 85–6.
- 27 Consider, for example, the very different issues raised by Krog (1999) (on South Africa’s Truth and Reconciliation Commission); Jacob K. Cogan (2000) (evidence in international criminal courts); May et al. (2001) (ICTY); Wald, (2003) (ICTY); Hirsch (2003) (genocide trials); Dezalay and Garth (1996) (international arbitration); Roebuck (2001) (Ancient Greek Arbitration).
- 28 See, for example, the Table of International Instruments and Comparative Legislation in Roberts and Zuckerman (2004); cf. Sir Stephen Sedley: ‘I do not understand how the law of evidence, for example, can now be responsibly taught without incorporating the jurisprudence of the [European Convention of Human Rights] into it.’ Sedley (2005) at 7; cf. Choo and Nash (2003), J. Jackson (2005).

- 29 Nicolson (1997) and Murphy (2001) are sympathetic to the general approach, but suggest different strategies. Cf. Mack (1998) (treating diversity as embedded in evidentiary questions of relevance and the logic of proof).
- 30 Roberts (2002).
- 31 Roberts and Zuckerman (2004).
- 32 A classic American statement of this view is Karl Llewellyn's 'The Study of Law as a Liberal Art' (1960, reprinted in Llewellyn (1962), ch. 17).
- 33 Llewellyn (1962) 301.
- 34 Roberts's lecture was confined to England and Wales. It is worth noting the paradox that one would expect American law schools to be more vocationally oriented, but the biggest obstacle to developing intellectual skills of analysis and argumentation about questions of fact are the bar examinations which place heavy emphasis on detailed knowledge of, and ability to apply, the Federal Rules of Evidence rather than on skills of analysing, managing and constructing arguments based on mixed masses of evidence. Thus, as so often happens, a liberal educational philosophy may be better placed to contribute to the development of useful transferable practical skills.
- 35 This formulation is in my own words and carries the ideas a bit further, but in ways that I believe are acceptable to Roberts.
- 36 Roberts and Zuckerman (2004), Preface,
- 37 For example, Childs and Ellison (eds.) (2000).
- 38 Posner (1999), Lempert (2001).
- 39 Siegel (1994); Nicolson (1994).
- 40 Nicholson (1994). For my views on post-modernist epistemology, see *GJB* at 289–309 (steering a course between Haack and Calvino). On human rights, see above n. 28.
- 41 See *Analysis* (2005), ch. 11, Acorn (1991), Roberts and Zuckerman (2004) *passim*.
- 42 Above ch. 6.
- 43 On the broader concept of 'standards for decision' see *Analysis* (2005), ch. 8.
- 44 *Analysis* (2005), ch. 11 and *passim*. In arguing for more attention to be paid to relevance, Roberts suggests that after a preliminary consideration at the start of a course, the lessons can be reinforced by explicit consideration of it in relation to other topics such as previous misconduct evidence, hearsay, and silence (306–7). I agree. See further Roberts and Zuckerman (2004) *passim*.
- 45 Roberts (2002), 324–8. The links between epistemology and scientific evidence have been brilliantly explored by the philosopher, Susan Haack (2003a), ch. 9, (2003b), and (2004). See also Brewer (1998). On the implications of advances in science and technology, see above 230 n. 35.
- 46 While agreeing with the idea that it is desirable to integrate the law of civil and criminal evidence quite closely with their specific procedural contexts, it is worth reiterating that the logic of proof is highly transferable, as are basic concepts such as relevance, credibility and probative force (cf. Roberts (2002), at 317). The new edition of *Analysis of Evidence* (2005) includes exercises on criminal cases, civil cases, intelligence scenarios, and historical events in order to emphasize this transferability.

- 47 See below 428–9. On crossing disciplinary boundaries, see Schum (1994) and ‘Twining’s hypothesis’ in *Evidence and Inference* (2003), discussed below ch. 15. On transcending legal cultures, see above n.22. For an attempt to apply modified Wigmorean analysis to a historical problem (the date of the demise of cuneiform) see Anderson and Geller (2003).
- 48 ‘Evidence-based narrative’ is similar to the notion of ‘anchored narratives’ developed by Wagenaar, Von Koppen and Crombag (1993), except that they place too much emphasis on generalizations rather than on particular evidence as ‘anchors’ for stories (*GJB*, 428–31).
- 49 However, there are good reasons for the preference: the law of evidence has too strong an association with the exclusionary rules and often leads to the fallacious assumption that the subject of evidence in law is co-extensive with the rules of evidence. This in turn leads to exaggerating the importance of the rules and paying insufficient attention to aspects, that are not governed by formal rules, such as relevance and weight (above, ch. 6). See further below 440.
- 50 Above ch. 3.
- 51 Above ch. 4. On post-modernism see n. 40 above. Cf. the interesting article by Risinger (2004) (arguing for the special moral position of ‘innocence in fact’ to be recognized within the Rationalist Tradition).
- 52 Zuckerman (1989); Ashworth (1998), Dennis (2002), Roberts and Zuckerman (2004).
- 53 Cf. Roberts: ‘...relevance is one of the least explored and most frequently abused concepts in the Law of Evidence’ (2002), at 306.
- 54 Thayer (1898), 314n.
- 55 Above ch. 6.
- 56 Roberts (2002), 306–7.
- 57 Ibid.
- 58 An exception is Sharon Hanson, *Legal Method and Reasoning* (2003), which deals in detail with reasoning about both law and fact. On the connections in trial practice see Palmer (2003) and Mauet (2005). Jim Covington tries to combine both approaches in his forthcoming work on evidence (Covington 2006).
- 59 On Bayesians and ‘Bayesio-skeptics’ see Roberts and Zuckerman (2004), 123–32. The main disagreements are about the conditions for the applicability of Bayes’ Theorem rather than its validity. Cf. Dawid (2002).
- 60 Roberts (2002), 301
- 61 *LIC*, 181–3.
- 62 There are good books *about* informal logic, e.g. Douglas Walton, *Informal Logic* (1989) (see also Walton (2002), Stephen Toulmin, *The Uses of Argument* (1964)); but there are few that claim to teach the relevant skills and techniques. Perhaps the best is still Max Black, *Critical Thinking* (2nd edn, 1952). On ‘fuzzy logic’ see Zadeh et al. (1974) and Yager et al. (1987) and the criticisms by Haack (1996).
- 63 The *Sally Clark* case is a striking example of how even distinguished medical experts can grossly over-simplify what is involved in proving a charge of murder (*R v Clark (Sally)* [2003] EWCA Crim 1020), discussed in symposium on Statistics and Law in (2005) 2 (1) *Significance*, Dawid (2005), Batt (2004) and Dwyer (2003).

- 64 Roberts (2002), 305. On the chart method, see above 12 n. 15.
- 65 This is in accord with the views of Schum *Foundations* (1994) and *Analysis* (2005).
- 66 On the Amsterdam School, see Feteris (1999a). For contrasting applications of the Amsterdam approach and the chart method to the bizarre ‘Ballpoint case’ (Netherlands) see E. Feteris and A. M. Dingley in Malsch and Nijboer (eds.) (1999), chs. 8 and 9.
- 67 Prakken (1996) and (2004).
- 68 For general discussions of the uses and limitations of modified Wigmorean analysis, see *Analysis* (1st edn), Preface and 117–31; *TEBW*, 179–86. Perhaps the best argument in favour of teaching the chart method is: ‘It works’. Anderson, Schum and Twining estimate that between them they have accumulated more than fifty years’ experience of teaching this approach in several institutions, mostly to law students, but also, in Schum’s case, to intelligence analysts and engineers. This experience tells us that the standard objections do not apply. Almost all of our students have found the process of learning the method challenging and hard work (the motto of our courses has been ‘tough, but fun’); nevertheless, the vast majority have succeeded in mastering the basic techniques and many have produced work of outstanding quality. Interestingly, the subject has worked best with first year law students in Miami, where it is a popular elective in the second semester. Of those who have gone on to practise law, many have reported that they have found the approach very helpful in practice, some claiming that it was the most useful course that they had in law school. Of course, they do not spend time drawing elaborate charts in straightforward cases, but the basic techniques of evidence marshalling and argument construction can become part of habits of mind that are invaluable and efficient in handling both simple and complex cases. This is hardly surprising because Wigmore’s method is essentially a systematization of the ‘best practice’ of good lawyers. Published examples of the application of the chart method to actual cases include: Abimbola (2002) (Stephen Lawrence); Anderson and Geller (2003) (Wigmorean Analysis applied to the debate about the survival of the Cuneiform script); Dingley (1999) (The Ballpoint Case, Netherlands)) cf. Feteris (1999b); Kadane and Schum (1996) (Sacco-Vanzetti); Robertson (1990) (Arthur Allan Thomas); Wigmore (1913a) (Hatchett and Umilian). For further examples see *Analysis* (2005).
- 69 All four approaches are dealt with explicitly in the new edition of *Analysis of Evidence* (2005), where they are treated as complementary. An interesting application of a simplified Wigmorean approach to preparation for trial is Palmer (2003).
- 70 Constructing the top of the chart is problematic if the applicable law is uncertain or there are multiple charges or claims. But such problems arise independently of which method is adopted. The *Louise Woodward* (the *Boston Nanny*) case, which involved several possible gradations of homicide, is a good vehicle for exploring these difficulties (*Commonwealth v Woodward* 7 Mass L Reprtr 449, WL 694119 (Mass. Super.) (<http://www.court tv.com/trials/woodward/>)).
- 71 For example, Peter Murphy: ‘Despite efforts to portray Wigmore’s method as a viable practical tool . . . the pure Wigmorean method involves an unnecessary and impracticable expenditure of time from the point of view of the practitioner’ *Murphy on Evidence* (7th edn, 2000) at 1n. Compare the more sympathetic treatment in Murphy

(ed.) (2003) at 3. Since we teach *selective* use of the chart method rather than ‘the pure Wigmorean method’, there is no disagreement. (*Analysis* (2005) at 123–4, 140–2.)

72 Solely by way of illustration (for there are many ways of doing this), let me describe what I do in the first six to seven weeks of my part of the London LLM course: the first step is to give the students a list of twenty or so concepts and work through most of these using very simple examples from (*Analysis* (2005) 10 (two murders) and 40–5 (a hypothetical police investigation)) and illustrating them with very simple pictures using only squares and circles as symbols. It takes about three classroom hours to elucidate, illustrate and discuss the most important concepts. Relevance, of course, is central. It is first elucidated by distinguishing relevance from materiality, admissibility, weight, and credibility. It is further elucidated in relation to background generalizations, chains of inferences, convergence, corroboration, and – a bit more sophisticated – Jonathan Cohen’s problem of conjunction in relation to the case as a whole. Meanwhile the students have read the engaging story by Kemelman, ‘The Nine Mile Walk’ (*Analysis* 11–18), which illustrates a number of points, including the significance of imaginative reasoning. We then move directly on to the chart method, presented in outline, systematized in a seven-step protocol, and illustrated by the same murder investigation. The best way to learn the method is by doing, so during the first six weeks the students are set three written exercises of ascending difficulty, one or two of which are done in ‘law firms’. We usually spend up to three weeks in class working through the seven-step procedure systematically in relation to *Bywaters and Thompson* (Schum uses *Sacco and Vanzetti*, Anderson the hypothetical cases of *Abel* and *Archer* and one or two US Supreme Court cases). Later the introductory lessons are reinforced by feedback discussions of the exercises, mini-trials, and one or two sessions on the relationship between the principles of proof and the law of evidence. The time-consuming part for the students is a major exercise – a full-scale analysis of a complex case (but involving selective microscopic analysis) done out of class. This counts for 35 per cent of the assessment for the full year’s course. It does not have to be handed in until the end of the academic year, after a day-long workshop in June (‘Wigmore Day’). In my eight-week section I usually find time to deal with stories, generalizations and standards for decision. A further three to four weeks are devoted to probabilities and proof (taught by Professor Philip Dawid). In an undergraduate course one would not expect students to reach such a high standard in respect of the chart method and something (perhaps the statistics part) might have to be sacrificed.

73 Above, ch. 6.

74 In the new edition of *Analysis* (2005), much more emphasis is placed on this last point throughout the book and a whole chapter is devoted to ‘The Principles of Proof and the Law of Evidence’ (ch. 11). Cases such as *DPP v Boardman* [1972] AC 421, HL, *R v Sang* [1980] AC 402, HL, and *R v George Joseph Smith* [1914–15] All ER 262, CCA (the *Brides in the Bath* case) are examples of leading cases in the law of evidence which are also good vehicles for exercises in the logic of proof. See also Acorn (1991) and Anderson (1999a).

75 For example, Nino (1996), A. Krog (1999), Amadiume and An Na’im (2000).

76 Hutton (2004), Butler (2004), discussed Runciman (2004).

77 National Commission on Terrorist Attacks (2004). See further below ch. 15.

78 Schum (1994/2001). *Evidence and Inference* (2003) was a modest attempt to advance Schum's agenda. See further below, ch. 15.

79 On the limitations of law in this context, see below at 446–8.

80 Cf. the classic formulation by Jerome Michael (1948), cited above at 16–17.

Evidence as a multi-disciplinary subject*

This paper argues that the start of the Millennium is a particularly promising time to consolidate on recent developments in order to make Evidence a multi-disciplinary field in its own right with inferential reasoning at its core.¹ It suggests that this field can be given coherence by adopting what David Schum has called a ‘substance-blind approach’ to inferential reasoning based on evidence.² My vantage point and my bias are those of a jurist who has a special interest in evidence in law, but my objective is to make the case for a perspective that emphasizes common problems and concerns that transcend the boundaries of a wide range of disciplines.

The idea is not new. Bentham wrote: ‘The field of evidence is no other than the field of knowledge.’³ He devoted his longest work to one part of that field, Judicial Evidence. Over two centuries there has grown up a massive theoretical and applied literature in many different contexts. Some of this transcends disciplinary boundaries, but in a spasmodic and patchy way. What is new is that in recent years evidence has gained an increasingly high public profile both in the media and academia in quite varied ways. Dope testing of athletes, authentication of art works, and problems of proving genocide feature in the news. DNA regularly hits the headlines.⁴ In popular fiction lawyer novelists have sometimes outsold writers of traditional detective and spy fiction. On television, as well as in bookstores, forensic scientists have joined the ranks of detectives and spies through Patricia Cornwell and programmes such as *Crime Scene Investigation*. In recent years international criminal tribunals and Truth and Reconciliation Commissions have proliferated, raising some new problems about evidence and story-telling.

Many of these newsworthy events have been reflected in developments in academic disciplines. Events in Eastern Europe, Rwanda, South Africa, and Latin America have stimulated an enormous interest in ‘memory’, in several disciplines.⁵ Among historians, Simon Schama and others stirred up controversy about the relationship between reconstructing the past, imagination, and evidence.⁶ The ‘narrative turn’ has extended beyond obvious disciplines, such as history, anthropology, and theology, to less obvious ones such as philosophy of science, geography, and economics.⁷ In the 1980s ‘evidence-based medicine’ and ‘evidence-based policy’ became fashionable in certain quarters, not without controversy.⁸ There are even signs of a Medicine-and-Literature Movement analogous to that in law and literature.⁹ New

technologies have made a significant impact on approaches to evidence in fields such as archaeology, art history, Assyriology, astronomy, and on through the alphabet.¹⁰

Perhaps the most obvious example has been the post-mortems on the tragedy of 11 September 2001. One standard line goes that the intelligence services had enough information to predict the event, but lacked the skills to analyse it. They did not have the capacity to 'join the dots' nor did they have methods for identifying as significant a few 'trifles' from the masses of data that flow in to different agencies from a variety of sources. In 2003–4 evidence was a primary focus of attention in news about Iraq: the weapons' inspections, Colin Powell's presentation to the Security Council, the question of links with Al Qaeda, the fruitless search for 'weapons of mass destruction', the 'dodgy dossiers', and the Hutton and Butler enquiries were all centrally concerned with evidentiary issues.¹¹

An article in *The New Yorker* in February 2003 reports interviews with leading figures in the CIA and the Pentagon who were concerned with improving intelligence analysis in the aftermath of September 11.¹² They included Donald Rumsfeld, George Tenet, and Robert Gates. The starting-point was a judgement that 'American intelligence agencies did not possess the analytic depth or the right methods of analysis accurately to assess [possible threats]'.¹³ The diagnosis and the prescriptions were expressed largely in terms that are familiar to students of evidence and inference: the dangers of hypothesis-driven enquiries; the need to distinguish between constructing a hypothesis and testing it against the available data; the different problems that arise from a surfeit of information and absence of evidence; the difference between ambiguity and incompleteness; the value of alternative interpretations of ambiguous evidence; the dangers of 'mirror imaging', that is 'projecting of American values and beliefs onto America's adversaries and rivals'; a tendency to confuse the unfamiliar with the improbable; the relationship between calculus of risk and thresholds of credibility; the likelihood of political bias entering into judgements where the situation is uncertain. Though the vocabulary is sometimes different, all of these ideas should be familiar to students of evidence and inference; some of them seem to be derived, directly or indirectly, from Wigmore and Schum.

Also symptomatic of this increased interest in evidence is the fact that in September 2002 one of the largest private foundations in Britain, the Leverhulme Trust, invited applications for what by their standards was a major programme in two fields: (1) The changing character of war and (2) The nature of evidence. This juxtaposition may not be a coincidence. The announcement read:

Evidence has an essential place in debates that form the heart of human enquiry. Its character is, however, remarkably varied according to the discipline or state of development of that discipline. 'Admissible evidence' has been the cornerstone of the **legal system** for a millennium. Its nature has graduated from assertion and *ex cathedra* statement to 'objective' observation, nowadays supported by forensic science. In such disciplines as **history**, **social sciences**, or **economics**, there is an analogous trend towards the quantitative. The aspirations of 'evidence-based' policy are one sign of this trend.

Evidence accepted in **scientific debate** is characterised by measurement or observation; the boundaries of uncertainty are capable of being established and reduced by improved or new techniques. Accidental or deliberate instances of error suggest that subjective aspects nonetheless remain. Even in those disciplines such as **mathematics** or **logic**, which depend on argument served by well-defined rules, the issue of evidence holds a place. The social/political/ psychological aspects of evidence then necessarily become central to an evaluation of its validity.

This statement, about which I have some intellectual reservations, generated enormous interest in British academic circles. It attracted a large number of bids from different universities. In my own institution, University College London, individuals from almost forty departments responded to an e-mail circular inviting expressions of interest. Eventually, two institutions, University College London and the London School of Economics, each obtained major grants for multi-disciplinary programmes jointly supported by the Leverhulme Foundation and the Economic and Social Research Council.¹⁴

Different conceptions of evidence

The label 'evidence' has a number of different associations, depending on context. When it is suggested that the common element in a multi-disciplinary focus on evidence is inferential reasoning, some agree, but others have expressed scepticism or surprise. For example, a historian might think that it is artificially narrow to separate inferential reasoning from broader concerns about narrative and truth; for some the main interest lies in particular kinds of data, such as archaeological remains, DNA, or psychological findings about memory or bias. Some are interested in particular problems of collecting evidence, or preserving it, or assessing its credibility; others are concerned with how evidence is used in practice in policy making or other kinds of decisions. Most of these concerns and problems are real enough, but they sometimes lead to a narrow or even a distorted view of Evidence as a subject.¹⁵ I think that it is relatively easy to demonstrate that the common element is the idea of the evidential role of linking data to hypotheses or probanda through inferential reasoning.

Some of these different perceptions of the field of Evidence have roots in intellectual history. Ian Hacking has suggested that the development of the theory of inductive reasoning was held up for several centuries, because before the seventeenth century the concept of evidence was restricted to the testimony of witnesses or the authority of man-made records and excluded the idea of making inferences from material objects or things.¹⁶ However, this thesis has been questioned. In the past, in law for example, different taxonomies have related to sources (e.g. witness testimony, documentary evidence, real evidence) or to types of data frequently used as evidence (e.g. fingerprints, polygraphs, confessions). In the nineteenth century some legal treatises were organized around the tasks of proving particular kinds

of probanda – for example, how to prove debt, the causes of railway accidents, or particular crimes.¹⁷ Treatises on the Law of Evidence have also struggled to construct a coherent framework for evidence doctrine, especially those that have ignored Thayer's thesis that the Law of Evidence is no more than a series of disparate exceptions to a principle of free proof, that is, ordinary common sense reasoning.¹⁸ Without understanding the nature of the principle, and the accompanying insight that rules of evidence need to be located in a framework of argumentation, it is hardly surprising that many students of the Law of Evidence find it a confusing hotchpotch with no apparent organizing principles.

However, some other associations with the label 'evidence' are quite firmly entrenched. Let me take two examples, one from medicine and one from law.

First, medicine: the Leverhulme announcement specifically mentions 'evidence-based policy', which has been a fashionable term in government circles in the United Kingdom in recent years. It has been particularly salient in clinical medicine. The story goes something like this. Starting in the late 1980s there developed a strong movement in favour of 'evidence-based medicine' (EBM) and more broadly of 'evidence-based' policy making. This went beyond the banal idea that practical decision making in politics, medicine or elsewhere should as far as feasible be based on reliable empirical data. Rather it proposed that certain kinds of general scientific data should be accorded priority over 'softer' particular in-puts, even in making decisions about particular cases or events, such as diagnosing and deciding on treatment of an individual patient. As my colleague, Patricia Greenhalgh (a Primary Care specialist) put it:

The so-called 'philosophy' of the EBM movement was a strictly empirical approach, based on largely randomised controlled clinical trials of interventions, could – and crucially SHOULD – provide all the information that doctors needed for clinical decision making. A perfect clinical decision was one that was made on the basis of a thorough assessment of all the relevant research literature (where 'research' was judged in a strict hierarchy with randomised controlled trials at the top and expert opinion at the bottom). EBM in its pure form was thus seen as antithetical to intuitive judgment, expertise or experience. Later developments in EBM allow that clinical experience and intuition, and the patient's idiosyncratic preferences, CAN play important roles alongside evidence from trials. But many unanswered questions remain ...¹⁹

The relationship between scientific generalizations and local or case-specific knowledge in particular cases is a familiar theme in history, law, medicine, and many other disciplines, as Jonathan Cohen and others have made clear.²⁰ What is interesting here in the phrase 'evidence-based' is that only certain kinds of scientific findings count as 'evidence' in contrast with what is referred to as 'intuitive judgment, expertise or experience ... and the patient's idiosyncratic preferences'. This usage of 'evidence' excludes most of what counts as evidence in law, history, and most other disciplines, especially in the humanities. It does not seem to allow for the idea of 'mixed masses of evidence'.²¹ Furthermore, in law or medical diagnosis

or historical enquiry, in considering a particular case calling for judgement about a particular event or situation, in so far as the issue is susceptible to rational argument, the main distinction is not between scientific and intuitive (or subjective) judgement. Rather it is between different kinds of generalization (scientific, common sense, case-specific)²² and particular items of information all of which have evidential functions in the context of an argument and all of which are subject to critical appraisal in respect of their evidentiary credentials – especially relevance, credibility, and probative force.²³ In arguing from particular (evidentiary) proposition to particular (interim or ultimate) probanda the warrant for each inferential step typically takes the form of ancillary evidence and one or more background generalizations.²⁴

Of course, many practical decisions are not arrived at or justified by open, articulated reasoning. So one could allow for a distinction between overt evidence-based decision making and intuitive judgement, but the meaning of ‘evidence’ would be different from that attributed to ‘evidence based medicine’ – in most contexts, ‘evidence’ cannot be restricted to ‘hard’ scientific data nor can classes of evidence be ranked in firm hierarchies in relation to either reliability or probative value.²⁵

In law, another entrenched usage of the term ‘evidence’ is as a shorthand way of referring to the Law of Evidence. As I have argued elsewhere, this is based on the false, and pernicious, assumption that the law of evidence is co-extensive with the subject of evidence in law – which includes the logic of proof and much else besides.²⁶ This argument seems to have fallen on deaf ears. A recent American law school textbook entitled *Evidence* illustrates the tendency. The Preface begins:

‘Evidence law is about the limits we place on the information juries hear.’²⁷

I find this disappointing for two main reasons: first, this statement mis-describes the scope and functions of the Law of Evidence by confining it to exclusionary rules in contested jury trials. The Law of Evidence applies to [nearly] all trials (and in modified form to most adjudicative tribunals) and to many other contexts within legal processes. Secondly, by equating ‘evidence law’ with ‘evidence’ (note the elision from the title to the Preface) this statement by implication excludes or downgrades all the many lines of enquiry that can be subsumed under ‘the New Evidence Scholarship’ and undermines a coherent conception of the subject of Evidence in law.

The broader conception of the subject includes inferential reasoning, probabilities, narrative, rhetoric, and the practical and theoretical implications of developments in forensic science, forensic psychology, and information technology. In so far as such topics find a modest place in some orthodox courses on the Law of Evidence, the focus is distorted, the intellectual framework is incoherent, and many important aspects are marginalized, especially when the contested jury trial is treated as the prototypical arena in which such topics are important.

My criticism is not directed at this particular book, which is merely conforming to a market in which the overwhelming demand is for courses on the Federal Rules of Evidence as part of preparation for bar examinations. It is ironic that the Federal

Rules are themselves based on Thayerite assumptions that provide the basis for a coherent conception of the field. The argument is worth repeating: the Law of Evidence consists of a series of disparate exceptions to a principle of free proof; the subject is given coherence by the principle; 'free proof' involves the application of ordinary 'common sense' practical reasoning within the competence of most citizens; the 'logic of proof' provides a systematic account of this kind of reasoning on the basis of evidence.²⁸

This same elision of the Law of Evidence and Evidence has also been a common feature of police attitudes and training. At least until recently, in England training of detectives and other investigators has focused on the rules of evidence with hardly any reference to skills in inferential reasoning.

The point is that, at its core, evidence as a multi-disciplinary subject is about inferential reasoning. The common ground is some general philosophical issues about logic, probability, truth, and knowledge. 'Evidence' is a word of relation used in the context of argumentation. (A is evidence of B). In that context information has a potential role as relevant evidence if it tends to support or tends to negate, directly or indirectly, a hypothesis or probandum.²⁹ One draws inferences from evidence in order to prove or disprove a hypothesis or probandum or other proposition that forms part of an argument.³⁰ The framework is argument, the process is proof, and the engine is inferential reasoning from information.

A substance-blind approach to inferential reasoning

David Schum has argued that many characteristics, credentials and principles of evidence are 'substance blind'.³¹ For example we can make general statements about relevance, credibility, authenticity, and probative force without reference to any particular kind of data. I would go one stage further and suggest that the core concepts of evidence as a subject are generally also blind to typologies of sources and matters to be proved.³² The main general characteristics of the subject of Evidence are substance blind, source blind, and hypothesis blind. In other words, the subject of Evidence at its core transcends disciplinary cultures, the objects of enquiry, and the peculiar methods and traditions of particular specialisms. Of course, there are special problems with DNA, polygraphs, witness psychology and so on. But the core of the subject is inferential reasoning.

In answer to the question: why do you think Evidence has special claims to be a good focus of attention, my argument is largely pragmatic. All disciplines that have important empirical elements are connected to a shared family of problems about evidence and inference. Apart from its theoretical interest (as a contribution to human understanding) evidence is of great practical importance in many spheres of practical decision making and risk management. In particular, multi-disciplinary study of evidence focuses attention on such questions as: (1) What features of evidence are common across disciplines and different contexts of decision making and what features are special? (2) What concepts, methods and insights developed

in one discipline are transferable to others? (3) What concepts are not transferable? Why? (4) Can we develop general concepts, methods, and insights that apply to evidence in all or nearly all contexts?

Such questions were the starting-point for an unusual project that has recently culminated in a book on *Evidence and Inference in History and Law*.³³ In 1994 Terry Anderson and I were part of a group of lawyers studying 'forensic expertise' at the Netherlands Institute for Advanced Study (NIAS), the Dutch equivalent of the Stanford Center for Advanced Study in the Behavioral Sciences (CASBS). As Fellows of NIAS we were expected to interact with our colleagues in other specialist theme groups. The other projects were: (a) history of Dutch political concepts; (b) theatre iconography – that is the use of works of art as evidence in theatre history; (c) magic and religion in ancient Assyria; (d) social dilemmas. In addition, there were a number of fellows working on individual projects. At first sight these seemed rather esoteric and diverse. But on reflection it seemed to me that most of the Fellows of NIAS in that year could fairly be said to have shared methodological problems about evidence and inference. So Anderson and I decided to throw down a challenge to our colleagues to run a joint seminar on these problems. The starting-point was what came to be known as 'Twining's hypothesis':

Notwithstanding differences in (i) the objectives of our particular enquiries; (ii) the nature and extent of the available source material; (iii) the culture of our respective disciplines (including its history, conventions, state of development etc.); (iv) national backgrounds; (v) other contextual factors, all of our projects involve, as part of the enterprise, drawing inferences from evidence to test hypotheses and justify conclusions and that the logic of this kind of enquiry is governed by the same principles.³⁴

This was framed in deliberately provocative terms and I expected it to be challenged, subverted, or modified in the course of discussion. However, rather than a general analysis of methodological issues the seminar resulted in a series of case-studies dealing with a somewhat bizarre range of topics: a lawyer and an assyriologist debated the evidence relating to the date of the death of the Sumerian language; a Shakespeare scholar and a jurist explored the differences in their approaches to a body of love letters that were the main evidence in a *cause célèbre*;³⁵ a political theorist, an economic historian, a theatre iconographer, and a musicologist contributed individual case-studies in their particular fields in the light of our discussions.³⁶ David Schum then contributed a general introduction drawing out some common themes.

No attempt was made to build a grand theory of evidence and inference – indeed the orientation of this group was strikingly particularistic. But the main concluding observations are worth noting:

First, there was no serious disagreement that we had overlapping problems of evidence and inference and that we could usefully discuss these across disciplines. Second, the members of the group were all drawn from the humanities and the social sciences and

all agreed that problems of evidence and inference could not be kept separate from questions about interpretation and narrative. Third, if representatives of the physical sciences, both pure and applied, and of cognate disciplines such as astronomy and mathematics had been represented, there would probably have been little difficulty accommodating them within the group – although there might have been more emphasis on probabilities and statistics and sharper disagreements on these issues. Difficult questions were raised about the relationship between fundamental problems of evidence and inference and the specific contexts and objectives of projects situated in different disciplinary cultures, but overall we had few serious problems of communication. (Introduction, p. 7)

This exercise was very much an experimental first step in treating Evidence as a multi-disciplinary subject in its own right.³⁷

Inference, culture, common sense, and narrative

The theme of the conference at which this paper was presented was ‘inference, culture and ordinary thinking’. If we treat Evidence as a subject that deserves to be a special focus of attention that transcends disciplines and if we treat the core as being inferential reasoning that has concepts and methods that are to some extent substance-blind, source-blind and hypothesis-blind, what is the connection with culture and ordinary thinking and, I would add, with ideas about common sense and narrative?

Within the study of evidence in law there is, I think, an identifiable set of answers to these questions within the Rationalist Tradition.³⁸ What we might call the Wigmorean view can be restated as follows: in the context of an argument about a question of fact every inferential step from evidence to interim proposition to ultimate probandum or hypothesis requires a warrant. Such warrants typically take the form of ‘background generalizations’. A background generalization can be case-specific (e.g. based on local knowledge or some general aspect(s) of the particular case, like the habits or character of the accused)³⁹ or it may be derived from ‘the stock of knowledge’ that is more or less shared in the relevant society or community.⁴⁰ The stock of knowledge may vary in respect of perceived reliability from scientifically-established laws through experience based generalizations to sheer speculation or prejudice, from beliefs deeply rooted in religion to ideas or impressions casually acquired, which may also be casually discarded. Reliability can be roughly represented by a continuum of common sense, horse sense, specialist expertise, and scientific knowledge, all of which belong to a shared stock of beliefs. In the common law tradition there is thus an explicit recognition of the link between warrants of inferential reasoning and the stock of knowledge or beliefs that are an important part of shared culture.⁴¹ This link was recognized in common law theories of evidence through the idea of ‘general experience’; for example, Wigmore’s book *The Principles/Science of Judicial Proof* was sub-titled ‘as given in logic, psychology, and

general experience.⁴² Common law rules about expert evidence and judicial notice fit within this conceptual framework.

The Wigmorean view also accommodates ordinary reasoning. As Jonathan Cohen put it, adult members of society can be assumed to have a 'general cognitive competence' that enables them to participate in adjudication as jurors, lay judges and witnesses.⁴³ This consists of two elements: first, existing knowledge of or ability to understand the main components of the social stock of beliefs; and, second, an ability to apply ordinary principles of inferential reasoning to disputed questions of fact in adjudication. Lay participation in the administration of justice is regularly challenged on one of two grounds: incapacity to understand complex evidence, as in fraud trials or white collar cases involving complex accounting evidence; or an incapacity to use correct reasoning.⁴⁴ Such challenges also go to the root of democracy – the idea that a deliberative democracy requires citizens who are cognitively competent to participate. Conversely, defenders of general cognitive competence challenge the idea that computer programmes can be developed to make judgements that are as good or better than the best judgements of ordinary citizens in many areas of practical decision making.

Today I would add some glosses to the orthodox Wigmorean view. First, we recognize that the idea of a cognitive consensus involving a common stock of knowledge or beliefs is highly problematic. This recognition extends beyond the idea of a plural or a multi-cultural society to the point that we can no longer treat societies, countries, or nations as self-contained units with clear and stable boundaries. Rawls usefully introduced the idea of an overlapping consensus in another context.⁴⁵ It can be used to curb tendencies to exaggerate the extent to which stocks of belief in fact vary across 'cultures' – how many people, in the United States or the world in general, actually believe that buses have square wheels, or witches fly on broomsticks, or that Coca Cola is a motor fuel? Recent work on criminal justice in the Netherlands suggests that some generalizations about police behaviour travel well across legal traditions and cultures.⁴⁶

A second gloss on the simple Wigmorean account relates to form. Standard versions of inferential reasoning, whether Baconian or Pascalian, are species of propositional logic. One infers conclusions from premisses that are expressed as propositions. When we talk of 'background generalizations' as the warrants or the glue in this kind of argument, there is a tendency to assume that we draw these from our stock of knowledge as ready-made propositions. But this is psychologically implausible. As I have argued elsewhere, an individual's stock of beliefs is unlikely to be stored in the form of a neatly categorized code or database.⁴⁷

Thirdly, in so far as an individual's or a group's stock of beliefs is like a *bouillabaisse*, it does not seem like an environment conducive to maintaining clear distinctions between is and ought, fact and value. Stereotypes, proverbs and stories typically have an evaluative element – that is often their main point.⁴⁸ One of the main claims of Wigmorean analysis is transparency: by forcing the analyst to articulate exactly what is being argued, including the inferential warrants, each

important step in an argument is laid open to critical scrutiny – a useful way of bringing to light speculation, exaggeration, prejudice, or bias. But there are still some difficult questions as to how a form of allegedly empirical argumentation can remain empirical when at every step the main source of glue is an undifferentiated bouillabaisse of unpositivised beliefs.⁴⁹

Stories form part of our stock of beliefs. There are important difficulties in extracting generalizations from particular narratives. These are analogous to the difficulties of determining the *ratio decidendi* or holding of a judicial precedent or of divining ‘the moral’ of a parable.⁵⁰ There is also a major issue concerning the relationship between narrative and argument in litigation and adjudication and, more generally, in reasoning about particular past events. Wigmore treated ‘the narrative method’ as an inferior substitute for his more rigorous chart method.⁵¹ Anderson and Twining, among others, treat narrative and argument as complementary both in respect of arguing towards a decision and in *ex post facto* justification.⁵² Modern psychological research, especially that of Pennington and Hastie, shows that the actual decision-making processes of American jurors approximate more closely to a holistic ‘story model’ than to an atomistic ‘rationalist model’.⁵³ At first sight, this suggests that there is a large gap between psychological accounts about how adjudicators, especially jurors, actually think and decide (the psychology of decision) and what constitutes a valid, cogent, and appropriate method of reasoning about facts in adjudication (the logic of proof).

The most sustained theoretical attempt to resolve this seeming paradox has been by Ronald Allen.⁵⁴ The central point of his complex thesis is that the logic of proof does not and cannot resolve the problem of conjunction of multiple elements (material facts) so as to provide a criterion for assessing the weight of the evidence in a case as a whole.⁵⁵ Stories provide a coherent structure of proof – a framework for considering the case as a whole. In common law adjudication jurors assess the relative strength of competing stories in terms in of their coherence (consistency, plausibility and completeness), coverage, and uniqueness.⁵⁶ ‘Atomistic’ analysis plays a role both in assessing stories on the basis of evidence produced at trial, the background knowledge of the triers of fact, and their skills in dealing with evidentiary problems and in confirming and disconfirming them.

I shall not try to do justice to Allen’s argument here. Although we may differ on some details, and on the relative emphasis we place on the importance of analysis in constructing as well as evaluating stories, I accept that this is a good theoretical basis for treating narrative and argument as complementary in the context of adjudication.⁵⁷

There appears to be very wide agreement among scholars and practitioners that narrative is of central importance in fact-determination.⁵⁸ However, story-telling is seductive and I think that there has been a tendency on the part of lawyers to romanticize it. In earlier chapters I have elaborated on the theme that stories are ‘necessary but dangerous’.⁵⁹ Stories help us to make sense of events, to structure an argument, and to provide coherence. But, in legal practice, they are also wonderful

vehicles for ‘cheating’.⁶⁰ For instance, they make it easy to sneak in irrelevant or unsupported facts, to appeal to hidden prejudices or stereotypes, and to fill in gaps in the evidence. ‘Good’ stories tend to push out true stories – and so on.⁶¹ It is clear that narrative plays a central part in many disciplines,⁶² but there are still many unanswered questions about the exact nature of their role: for example, how exactly does narrative help us to ‘make sense’ of an event? How far is the use of narrative in practice ‘legitimate’? In what respects are the roles of narrative in adjudication, historiography, and police investigation different? And so on. There is plenty of scope for more research.

Limitations of law

Many non-lawyers interested in inferential reasoning and argumentation have recognized that law provides a rich source of concrete, real-life, examples that illustrate facets of evidence, inference and proof. Toulmin, Perelman, Gaskins, the Amsterdam School of Argumentation and above all Schum are some modern examples.⁶³ Schum even goes so far as to suggest that legal scholarship on evidence ‘forms the major source of inspiration for anyone interested in a general study of the general properties and uses of evidence’.⁶⁴

As I am something of a legal nationalist, I am usually delighted when I find my territory is thought to be interesting by colleagues from other disciplines. However, it is important to recognize the limitations of standard legal examples. In considering problems of evidence and inference three distinctions are crucial: the difference between past-directed and future-directed enquiries; the distinction between particular and general enquiries; and the distinction between hypothesis formation and hypothesis testing. For various reasons, including the tendency to equate evidence in law with the Law of Evidence, the contested trial is widely perceived to be the main arena in which evidentiary issues arise. Adjudication of issues of fact in contested trials is typically past-directed, particular, and hypothesis testing – it only exceptionally deals with predicting the future, refuting, testing or proving general empirical propositions, or hypothesis formation. These characteristics of standard legal examples may limit their significance in many other contexts.

Of course, the prototype of the contested trial, especially in common law adversarial proceedings, has certain features that do indeed make it a rich source of material for study: typically the proceedings are public, the conflict is overt, the issues are sharply defined, and evidence is presented, questioned, and argued about, and the legal record makes for neat packaging of complex material. Often the record contains a great deal of detail, the data and arguments are complex, and there is a mixed mass of evidence of different kinds. Above all, trials deal with ‘real life’ problems rather than hypothetical or fictitious examples. For the student of inference there may be ‘noise’ factors that have to be filtered out such as technicalities of procedure, lawyers’ tactics, artificial rules of evidence, and blurred lines between

rational argument and effective persuasion. But trial records can provide a wealth of examples that illustrate different attributes and credentials of evidence, the structure of complex arguments, problems of combining mixed masses of evidence, and common fallacies in inferential reasoning.

Disputed trials are typically concerned with enquiries into particular past events in which the hypotheses are defined in advance by law – what lawyers call ‘materiality’. Moreover cases are artificially constructed units extracted from more complex and diffuse contexts. For example, a criminal trial may be just one event in a long-drawn out feud or other conflict. These elements – particularity, pastness, materiality, and individuation of cases – differentiate this kind of legal material from many other enquiries in which inferential reasoning is involved.

In adjudication, there is a further factor, the duty of the adjudicator to come to a firm decision. Judges decide, historians and scientists conclude, but they do not have to. This pressure for decision has led the law to develop important ideas about presumptions, burdens of proof and standards of proof as aids to decision. These can be quite suggestive in other decision contexts.

Thus historians share with lawyers a concern with particular past events, but historians lack the concept of materiality that identifies in advance the hypotheses to be proved or negated and that helps to formulate and anchor disputed issues of fact in advance with precision and specificity. Historians are often involved not only in establishing what happened but also explaining why it happened – often a more difficult and more interesting problem.⁶⁵ Furthermore, historians are typically interested in questions that go beyond establishing and explaining a particular event. For example, a great deal of the vast literature about the *Sacco-Vanzetti* case treats as straightforward or assumes the question of their innocence in order to explore wide-ranging questions about the political, social and legal context of the time.⁶⁶

Detectives, like adjudicators, are typically also concerned with particular past events – ‘whodunit’, Sherlock Holmes’s kinds of questions – and their enquiries may be guided by legal categories such as murder, manslaughter, and accident.⁶⁷ But like historians, scientists, and many other enquirers, they have to construct hypotheses as well as test them. The typical decided case is not a good vehicle for learning about or developing skill in abduction and imaginative reasoning as part of the process of investigation.⁶⁸

Intelligence analysts, now much in the news, are often involved with predicting future possibilities and probabilities in a changing context with the continuing prospect of further information. Sometimes they are asked to predict precise probabilities – what is the likelihood of an attack on a particular target in a particular time period? – but they are also often concerned with more open-ended possibilities based on judgements about capabilities and intentions. Moreover, they are also concerned with building up general intelligence pictures of networks, scenarios, and so on. As the post-September 11 post-mortems have made clear, it is usually much easier after an event to identify bits of information that would have been useful had they been spotted and selected as significant.

The prototypical enquiry in ‘pure science’ is concerned with the formulation and testing of *general* hypotheses, which *inter alia* form a solid basis for prediction. The classic ‘problem of induction’ concerns the difficulty of justifying an inferential step from a series of particulars to a general conclusion. In this context, the establishment and interpretation of particulars is often treated as unproblematic.⁶⁹ The paradigmatic adjudicative enquiry is concerned with establishing particulars – often the most simple part of a general scientific enquiry. Of course, where *application* of general scientific principles to particular instances is involved, for example in medical diagnosis or forensic pathology or giving expert testimony in court, the analogy to fact-finding in adjudication is somewhat closer.

It would, of course, be rash to say that lawyers have it easy in respect of evidence and inference, just because particular enquiries may often be easier than general ones, and because they have aids to decision such as materiality, burdens of proof, and presumptions. Disputed trials are often disputed because the evidence is especially problematic – otherwise there would be a guilty plea or a settlement. *Causes célèbres* are often celebrated because there is an unsolved mystery. More important, the contested trial is only one legal context among many. Problems of evidence and inference arise in many other legal contexts – including investigation, negotiation, mediation, anticipating future contingencies (as in drafting contracts), and law-making, where some of the elements of materiality, predictability, pastness, and individuation of cases are absent.

Non-lawyers may be justified in treating the contested trial as paradigmatic in law just because the secondary legal literature often makes this assumption and is accordingly more developed and sophisticated in respect of this arena. For this same reason, academic lawyers tend to treat Evidence as a technical subject for specialists in the law of evidence and accordingly to overlook the centrality of inferential reasoning about questions of fact in other legal contexts, such as investigation, negotiation, mediation, law-making and so on. Similarly, the law and literature movement has tended to neglect the problematic relationship between narrative and inferential reasoning; legal philosophers continue to confine the topic of ‘legal reasoning’ to reasoning about questions of law; and only recently have those interested in economic analysis, post-modernism, and critical legal studies directed their attention to issues of evidence.⁷⁰

An integrated ‘science of evidence’?

The emergence of a recognized multi-disciplinary field naturally raises questions about its generality, its coherence, and its utility. One way of posing the question is: can there be an integrated ‘science of evidence’ and what would be its scope? Some of us are hesitant to attach the label ‘science’ to a subject that is so deeply rooted in the humanities and social sciences as well as the physical sciences.⁷¹ And, of course, we cannot just *assume* the generality and transportability of ideas and issues. Nevertheless, it is worth trying to develop a general

theory of evidence across both disciplines and contexts of practical decision making.

One possible basis for this is Schum's 'substance-blind' approach. It is important in this context to be clear about the scope and limits of Schum's claims for this approach.⁷² Its main claim is that there are some concepts and principles of inferential reasoning that can travel far across disciplines, types of enquiry between and within particular disciplines, and a variety of contexts of practical decision making that involve a significant empirical element. The central concepts are relevance, credibility, and probative force. In relation to these Schum has assembled a rich array of concepts and distinctions, some drawn from different disciplines, some developed by Schum himself. He has used these concepts in presenting practical intellectual procedures for analysing evidence, forming hypotheses, and constructing arguments in the contexts of police investigation, intelligence analysis, and litigation.⁷³ So his approach is not limited merely to a taxonomy of forms and combinations of evidence.

Nevertheless, the claims of a 'substance-blind approach' are quite limited. As I interpret it, deductive logic, Bayes' Theorem and general principles of statistical reasoning are 'substance-blind' in the same way.⁷⁴

First, the approach does not claim to say much about the uses of evidence in different kinds of enquiry, nor about particular practical problems relating to specific kinds of evidence (e.g. deterioration of DNA samples, the reliability of confessions, the interpretation of texts belonging to different traditions of historiography).

Secondly, the claims are limited to empirical, hypothesis-driven enquiries,⁷⁵ and, in many contexts sharp distinctions between fact and value are difficult to maintain. 'A substance-blind approach' to inferential reasoning does not, on its own, claim to throw light on such matters as the purposes of an enquiry, the conditions under which it is undertaken, how 'problems' are framed, potentially competing interests and values, or the uses to which particularly evidentiary arguments are put. One of the objections to rigid versions of 'evidence-based' policy-making is that an evidentiary perspective tends to gloss over the political, ideological, or ethical aspects of policy decisions under the guise of a 'value-free' scientific approach.

Thirdly, much detailed work still needs to be done on the transferability, applicability, and utility of Schum's conceptual scheme. There is plenty of room for controversy in this regard. For example, few doubt the validity of Bayes' Theorem, which can be said to be 'substance-blind' in the same sense; but there is widespread, sometimes heated, disagreement about the conditions of applicability of Bayes' Theorem and whether they are satisfied in particular contexts.⁷⁶ Similarly, there are unanswered questions about the transferability to other contexts of concepts or data developed in a particular context.⁷⁷ For example, further work is needed on the applicability and utility, with or without adaptation, of lawyers' concepts such as presumptions, standards of proof (and other standards for decision) and materiality – some of which are contested within law.

Fourthly, as indicated above, different kinds of enquiries need to be differentiated. Distinctions between hypothesis formation and hypothesis testing, past-directed and future-directed, and general and particular enquiries are only a start.⁷⁸ As a jurist, I have mainly been concerned with hypothesis testing in the context of enquiries into particular past events, though under the tutelage of Schum I have learned much about the applications of inferential reasoning at different stages of criminal process, especially investigation, decisions to prosecute, adversarial and dialectical argument, and adjudication.

Some of us are hesitant to attach the label 'science' to a subject that is so deeply rooted in the humanities and social sciences as well as the physical sciences.⁷⁹ And, of course, we cannot just *assume* the generality and transportability of ideas and issues. That is a matter for detailed enquiry. Nevertheless, it is worth trying to develop a general theory of evidence across both disciplines and contexts of practical decision making.

Perhaps the central theoretical question should be: how far can we generalize about evidence and inferential reasoning across disciplines, contexts, and types of enquiry? If so, more specific issues that need to be addressed include:

- 1 Are there universal principles of reasoning from evidence?
- 2 What counts as 'evidence' has varied across time, language, cultures, practical contexts, and academic disciplines. Is it possible to construct an analytic concept or framework of concepts that transcends these various contexts?
- 3 To what extent can a substance-blind approach to evidence (Schum) also be context-blind?
- 4 What is the relationship between narrative and reasoning in the context of argumentation? To what extent does that relationship vary according to disciplinary and practical contexts? What exactly is meant by the claim that stories help us 'to make sense of the world'? What can legitimately be claimed can be done by narrative that cannot be done by reasoning?
- 5 To what extent and in what respects can evidentiary concepts, distinctions, and methods developed in one discipline or practical environment be applied, with or without modification, to other disciplines and contexts?
- 6 What are the uses, limitations and dangers of formal representations of inferential arguments (Bayes' nets, Wigmore charts etc)?
- 7 What are the uses and limitations of evidence-based approaches to medicine, policy, or other activities?
- 8 What can reasonably be expected of computers and artificial intelligence as aids to inferential reasoning?
- 9 In any given context, in what respects, if any, does the structure, validity, cogency, and appropriateness of an argument about a question involving a mixture of facts and values differ from an argument about questions involving simple facts?⁸⁰
- 10 What general lessons can be learned from recent developments in handling evidence in police investigation, intelligence analysis, forensic science, and other practical operations?

- 11 To what extent do people's actual practices in dealing with evidence, in any given context, diverge from normative prescriptions about how they should think and act in relation to it? To what extent do these practices lead to better or worse judgements?

Much of the work that is going on is of an applied nature. These are exciting, but relatively recent, developments. A rich range of seemingly disparate activities is burgeoning. In University College London, for example, individuals from over twenty departments are involved in the Leverhulme-ESRC programme, which began in January 2004. In addition to specific projects on formal tools for handling evidence, enquiry and detection, historical evidence, human attitudes to evidence (psychology), geography, economics, the history and philosophy of science, and primary health care, there are three active multi-disciplinary groups on causality, narrative, and prediction, and a case-study of inter-disciplinarity.⁸¹ Other multi-disciplinary projects are proliferating elsewhere in several countries. Whether or not these varied efforts will evolve into a fully integrated 'science of evidence' is still an open question that will take many years of theorizing, detailed research and debate to resolve. This is not much more than a beginning.

* This is a revised version of a paper given in New York in April 2003 at a conference organized by Peter Tillers on 'Inference, Culture and Ordinary Thinking in Dispute Resolution'. An earlier version was published in *Law, Probability and Risk*, vol. 2, 91–107. Substantial parts are reproduced here by permission of Oxford University Press. See also Scallen (2003) (comment on the original paper). I am grateful to Terry Anderson, David Schum, and Peter Tillers for helpful comments on an earlier draft. I owe a much broader debt to all three. I have collaborated closely for many years with Terry Anderson. This paper is in large part a reaffirmation and extension of some central ideas in Schum's *Evidential Foundations of Probabilistic Reasoning* (1994/2001). I hope, too, that it is a reaffirmation of some of the basic ideas of Peter Tillers to whose extraordinary enthusiasm, energy, and insights we owe not only this and other conferences, but a whole evidence community that extends far beyond the law.

- 1 In this context 'Evidence' is preferable to 'Evidence Science', for the latter might carry some association with the dubious idea of disciplinary 'autonomy'; it may also suggest that the subject belongs to the 'hard' more than the 'soft' disciplines, rather than at their interface.

2 Schum (1994/2001, 2003).

3 Bentham VI Works (1810) 2.

- 4 There have been other powerful developments in forensic science and technology. For example, in England several police authorities have been won over to FLINTS (Forensic Led Intelligence System), a computer programme that is a powerful tool for investigating multiple crimes and making links between crimes that were not previously thought to be connected. Its proper operation requires that police investigators should be trained in basic skills of inferential reasoning and analysis. It was developed by Richard Leary and is based in part on ideas developed by Wigmore and Schum (Leary 2002, 2004).

- 5 E.g. Nino (1996), Krog (1999), Amadiume and An Na'im (2000).
- 6 For example, S. Schama, *Dead Certainties* (New York: Knopf, 1991); cf. two recent imaginative attempts to reconstruct the life and thought of Henry James (Tóibín (2004), Lodge (2004)) in the form of novels illustrate the tenuous borderline between 'faction' and certain kinds of fiction.
- 7 Nash (1986). See above ch. 9.
- 8 My colleague at UCL, Trisha Greenhalgh, having published a best-selling student text on evidence-based medicine (Greenhalgh 2001, 1st edn, 1997), followed it up with a book entitled *Narrative based medicine* (Greenhalgh and Hurwitz (1998)).
- 9 Greenhalgh and Hurwitz (1998) at 273–8; cf. K. M. Hunter, *Doctors' Stories* (1991).
- 10 For example, Twining and Hampsher-Monk (eds.) (2003): Anderson and Geller (Assyriology), chs. 3–5; Katrizky (theatre iconography) ch. 6; Heck (musicology) ch. 7; Houben (economic history) ch. 8; Hampsher-Monk (intellectual history) ch. 9.
- 11 Hutton Report (2004), Butler Report (2004), Guardian (2004), Runciman (2004). Cf. the massive American literature, exemplified by the very readable 9/11 Commission Report (National Commission on Terrorist Attacks (2004). On intelligence analysis and the Wigmorean approach see *Analysis* (2005), 3–8, 47–51.
- 12 Jeffrey Goldberg (2003), 40–7.
- 13 Ibid.
- 14 For details see <http://www.evidencescience.org/> (UCL) and <http://www.lse.ac.uk/collections/economicHistory/Research/facts/Default.htm> (LSE). I am associated with the programme at UCL. Other indications of a growth of interest in multi-disciplinary approaches to evidence include the work of the Joseph Bell Centre in Edinburgh, the Institute of Information and Computing Sciences (Utrecht) and recent articles in such journals as *Law, Probability and Risk*. In 2004 the prestigious Darwin lectures in Cambridge were devoted to 'Evidence': Tybjerg, Swenson-Wright, and Bell (eds.) (2005).
- 15 In law confessions, the presumption of innocence, and problems of eyewitness identification are examples of topics in which a narrow evidentiary perspective has tended to distort particular issues and phenomena. For example, focus on admissibility of confessions may obscure the fact that most confessions are not retracted; similarly, focus on identification parades as evidence-generating devices can distract attention from their other functions and uses. See further above ch. 5 and 258, 268–9 n. 79.
- 16 Hacking (1975), at 31–48. This thesis has been questioned by Mirjan Damaska, who argues that there was a greater continuity in conceptions of evidence (personal communication to the author) (cf. Damaska (2003) at 128–9).
- 17 Roscoe (1st edn, 1827), Phillipps (1st edn, 1814), Moore (1908). Greenleaf (1st edn, 1842), and Taylor (1st edn, 1848) are examples of works which tried to introduce general concepts and principles, but which still were largely organized in terms of different kinds of probanda. See above 69–71.
- 18 Thayer (1898), discussed above ch. 6. On 'free proof' see Twining (1997e).
- 19 Greenhalgh (2003). See note 8 above.
- 20 Cohen (1977), (1980a), (1983).
- 21 Wigmore (1937).
- 22 *Analysis* (2005) at 262–76, Anderson (1999b).

- 23 Schum (1994).
- 24 ‘While we can say that generalizations and ancillary evidence help us to defend the strength of links in chains of reasoning we construct, we can also say that generalizations and ancillary evidence represent the “glue” that holds our arguments together’ (Schum (1994), at 82).
- 25 Attempts to make formal or even quite loose rankings of *classes* of evidence are reminiscent of Sir Geoffrey Gilbert’s reliance on ‘the best evidence rule’ (1754). This was the subject of Bentham’s scathing critique in *An Introductory View* (ch. 31 and Appendix C), discussed above 39–41. For lawyers, at least, Bentham carried the day, and the rule is generally treated as an ‘evidentiary ghost’ or at most an extremely vague principle. However, see Nance (1988).
- 26 Above chs. 2 and 6; see, however, Murphy (2001).
- 27 Fisher (2002), Preface.
- 28 ‘The logic of proof’ was Wigmore’s term. It includes induction, analogy, and now abduction, as well as deduction. ‘Logic’ is used in a wider sense than is accepted by some logicians. It does, however, conform to Skryms’ well-known definition: ‘Logic is the study of the strength of the evidential link between premises and conclusions of arguments’ (Skryms (1986) 4).
- 29 On ‘relevant evidence’ cf. Federal Rules of Evidence, Rule 401. On hypothesis-formation on the basis of what Sherlock Holmes called ‘trifles’ through abduction/imaginative reasoning, see *Analysis* (2005) 55–8 and Eco and Sebeok (1983).
- 30 In discussions at UCL the question arose: is evidence always related to a hypothesis? The answer depends on the meaning of ‘hypothesis’ in this context. The *Oxford English Dictionary* lists several quite different meanings. Max Black, in the context of enquiry, distinguishes between ‘1. A proposition not known to be definitely true or false, examined for the sake of determining the consequences that would follow from its truth [and] 2. A tentative solution to a problem.’ (Black (1952) at 441, cf. 274). Here we are mainly concerned with (2) (hypothesis as tentative conclusion rather than as premiss).

Evidence is a word of relation (A is evidence of B). In the tradition of logic that tends to be taken for granted in this context (informal propositional logic in the tradition of J. S. Mill, involving induction and abduction as well as deduction) A and B are both propositions. We infer proposition B from proposition A (or from propositions A + n) either directly or indirectly. In Wigmorean terms B can be either an ultimate or penultimate or interim probandum in the context of an argument. B is not necessarily ‘hypothetical’ in the sense of conjectural or speculative or postulated, for B could represent a generally accepted ‘truth’ or a controversial belief or an allegation, for example.

As Schum makes clear, evidence has a role in hypothesis formation as well as hypothesis testing (from the fact that the dog did not bark in the night Sherlock Holmes inferred that the thief was known to the dog, which narrowed the range of suspects and eliminated strangers). Of course, an enquiry may involve forming and testing several hypotheses, which may be rivals or alternatives or complementary. It is fair to say that this conception of evidence fits most easily the form of hypothesis-driven enquiries (Did X happen? Was it Y whodunnit?) rather than open-ended enquiries (What

happened? Whodunnit?) in which no answer is suggested to the question: evidence of what? Generally, information does not become ‘evidence’ until it is related to some specific proposition, that it tends to support or negate. But, of course, in the early stages of an enquiry information may be treated as potential evidence without any clear indication of a hypothesis. Police investigators have to tread a careful path between directionless open-ended enquiries and ‘suspect-driven enquiries’ in which attention is focused prematurely on a single hypothesis.

- 31 Schum (1994); Schum (2003); *Analysis* (2nd edn), ch. 2. Schum uses ‘substance-blind’ ‘to describe a particular way of categorizing forms and combinations of evidence without reference to its substantive content. Such a categorization is based on inferential properties of evidence rather than its contents’ (*Analysis* (2005), Glossary at 386) (see further below at 449–51).
- 32 That is to say, they transcend the differences between types of evidentiary data (such as traces, handwriting, and witness testimony) and different probanda (such as a charge of murder, the explanation of an historical event, a hypothetical scientific generalization, or a hypothesis about the likelihood of some future occurrence).
- 33 Twining and Hampsher-Monk (2003).
- 34 *Ibid.*, 4.
- 35 Above ch. 12.
- 36 See above n. 10.
- 37 See comments by Abimbola (2004) and Zahle (2004).
- 38 See above chs. 3 and 4. ‘The Rationalist Tradition of Evidence Scholarship’ in law is based on a series of assumptions that can be succinctly summarized as follows: fact-determination in adjudication involves the just implementation of law through the pursuit of truth by the method of reason. This set of assumptions, as an ideal type, has both prescriptive and descriptive aspects many of which have been challenged by a variety of ‘strategies of scepticism’.
- 39 Above ch. 11. See further *Analysis* (2005), 113–15 and ch. 6, Anderson (1999b).
- 40 Cohen (1977) discussed above ch. 11.
- 41 I prefer ‘stock of beliefs’ because what passes for ‘knowledge’ in a given society varies over time. To acknowledge this is not to commit what Susan Haack has labelled ‘the passes for fallacy’ (Haack (1998) 93–4, 117–19). In this context, the idea of ‘stock of knowledge/beliefs’ is collective; for example, a good deal of scientific and expert knowledge is ‘counter-intuitive’, i.e. contrary to common sense.
- 42 Wigmore (1937).
- 43 Cohen (1977), (1983).
- 44 The controversial Adams cases in England (*R v Adams* [1996] 2 Cr App T 467, CA; *R v Doheny and Adams* [1997] 1 Cr App R 369, CA; *R v Adams (No. 2)* [1998] 1 Cr App R 377, CA), which ruled out the explicit use of Bayes’ Theorem in court were based not on any theoretical position about its applicability or otherwise in the circumstances of that case, but on the pragmatic policy reason that the mode of discourse in courts should be framed in terms that the decision makers can understand. See Roberts and Zuckerman (2004) at 118–19, 129 and Dawid (2005a).
- 45 Rawls (2001).

- 46 Wagenaar et al. (1993), Anderson (1999a).
- 47 See above 338.
- 48 Above ch. 13.
- 49 In law, the issue is made more complex by the point that ‘issues of fact’ and facts to be proved often contain a discretionary evaluative element and more fundamentally every judgement of guilt or liability is itself evaluative: Zuckerman (1989).
- 50 On the analogy between parables and legal precedents, see above ch. 13.
- 51 Wigmore (1937), s. 36.
- 52 Anderson and Twining (1998) (*Analysis*, 1st edn) at 155–65.
- 53 Hastie, Pennington, and Penrod (1983), Hastie (1993), Pennington and Hastie (1991).
- 54 Especially, Allen (1991), (1994), Allen and Leiter (2001).
- 55 The *locus classicus* on ‘the problem of conjunction’ is Cohen (1977), about which controversy continues. See *Analysis* (2005), 103–4.
- 56 Pennington and Hastie (1991). Allen usefully links these tests to Nicholas Rescher’s ‘demands of rationality’: consistency, uniformity, coherence, simplicity, and economy (Allen (1994) at 628, citing Rescher (1988), at 16–18).
- 57 ‘We thus see the convergence of the structural theory of proof and the theory of evidence. The structure of proof requires selection over the stories advanced at trial, and for data to be coherent to be embedded, or be able to be embedded, in stories highly analogous if not identical to the stories being advanced by the parties as their claims about what happened’ (Allen (1994), at 630). An important point of difference is that, in our view, the ‘theory of a case’ interpreted to mean a strategic argument for a case-as-a-whole (as depicted, for example, in Wigmore charts) is another, complementary method of providing coherence. Thus narrative, although important, is not the sole means of providing coherence. See generally, *Analysis* (2005), chs. 3–6.
- 58 However, ‘narrative’ is sometimes used loosely to include scenarios, scenes, situations (see above 293). Compare the careful exploration of ‘evidentially-supported scenarios’ in Tillers and Schum (1991).
- 59 Above chs. 9–13 and *GJB*, chs. 13 and 14.
- 60 ‘Cheating’ here means violating legal conventions of a given legal system: for example, in England, conventional precepts such as ‘judge the act, not the actor’, ‘decide on the basis of the evidence presented’, ‘keep separate questions of fact and questions of law’, ‘decide impartially, discounting bias and prejudice’. Of course, such conventional principles are themselves subject to critical appraisal from a number of standpoints.
- 61 *GJB*, ch. 14.
- 62 Nash (1986).
- 63 Toulmin ((1964), Gaskins (1992), Perelman and Olbrechts-Tyteca (1971). On the Amsterdam School, see van Eemeren and Grootendorst (1992) (1996), Feteris (1999a), and the journal *Argumentation*.
- 64 Schum (1994), at 6. This theme is developed in ch. 2.
- 65 In practice, fact finders want to ‘make sense’ of a case by understanding not only what occurred, but why it occurred. For example, proving motive may not be a formal requirement or an evidentiary need in proving a criminal case, but it is often a practical

necessity for police, attorneys and fact finders. This is one of the main functions of story telling in advocacy.

- 66 See the literature discussed in Felix (1965). Of course, this is not true of Kadane and Schum (1996).
- 67 *Analysis* (2005), ch. 2.
- 68 Ibid.
- 69 Cf. Allen (1994) at 624: 'In science, unlike the law, the data are virtually never problematic. What actually happened is typically the uncontroversial starting point for attempting to explain what happened . . . In the law, exactly the opposite obtains . . . Controversy virtually always settles on what happened.'
- 70 E.g. Nicolson (1994), Pardo (2000). On economic analysis, see Posner (1999), Lempert (2001).
- 71 See n. 1 above.
- 72 Schum (1994/2001), (2003).
- 73 Schum and Tillers (1988), Schum (1987), Kadane and Schum (1996), *Analysis* (2005). Among Schum's concepts that I have found useful are: ancillary evidence; fact investigation; hypotheses as magnets; credibility attributes (authenticity, accuracy, sensitivity, reliability); tests of witness credibility (veracity, objectivity/bias, observational sensitivity); cascaded, hierarchical, and multi-stage inferences; missing and incomplete evidence. Some of these are coined by Schum; others he has usefully elucidated in the context of inferential reasoning from evidence.
- 74 This is confirmed by David Schum: 'If all A's are B's and we find an A, then it will be the case this A is also a B. It does not matter what A and B refer to: i.e. the rule is substance-blind; it holds whatever the hypotheses we are evaluating in light of whatever kind of evidence we have. The same applies to inferential rules based on other formulations, such as Schafer's belief functions or Cohen's Baconian probabilities or even Zadeh's fuzzy probabilities. None of the rules in these systems rest upon substance or content.' (Personal communication to the author, 24 August 2005). See further *Analysis* (2005), chs. 2 and 9. Of course, there are important questions about the transferability and applicability of some of Schum's other concepts and generalizations. Such questions are central to continuing work on a general theory of evidence.
- 75 See above n. 30.
- 76 On 'Bayesian-Skepticism', see L. J. Cohen (1977), Roberts and Zuckerman (2004) 120–32, Dawid in *Analysis* (2005), Appendix I.
- 77 This is a central concern of the LSE project, London School of Economics (2005), n. 14.
- 78 Another distinction, developed in the context of causation in law, is between descriptive, explanatory and attributive enquiries (Hart and Honoré (1985)).
- 79 See n. 1 above.
- 80 See n. 49 above.
- 81 For details, see the website (above n. 14).

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(see also Abbreviations list, p. vii)

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